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FEDERAL MINE SAFETY
AND
HEALTH REVIEW COMMISSION

JANUARY 1980
Volume 2
No. 1

DECISIONS

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JANUARY

The following cases were Directed for Review during the month of January:

Secretary of Labor, MSHA, v. Burgess Mining & Construction Corporation, SE 79-42-R; (Judge Fauver, December 13, 1979)

Cleveland Cliffs Iron Company v. Secretary of Labor, MSHA and United Steelworkers of America, VINC 79-68-M, and Secretary of Labor, MSHA v. Cleveland Cliffs Iron Company, VINC 79-240-PM; (Judge Broderick, December 3, 1979)

Secretary of Labor, MSHA v. Cyprus Industrial Minerals Co., DENV 78-558-M (Judge Koutras, December 18, 1979)

Secretary of Labor, MSHA, v. Davis Coal Company, WEVA 79-130 through WEVA 79-133, (Judge Michels, December 13, 1979)

Secretary of Labor, MSHA, v. El Paso Rock Quarries, Inc., DENV 79-139-PM, etc., (Judge Moore, December 17, 1979)

Secretary of Labor, MSHA v. Cement Division, National Gypsum Company, VINC 79-154-PM, (Judge Broderick, December 26, 1979)

Secretary of Labor, MSHA, v. Oracle Ridge Mining Partners, WEST 79-248-M, (Judge Merlin, December 11, 1979)

Secretary of Labor, MSHA, v. Van Mulvehill Coal Co., Inc., SE 79-127, (Judge Broderick, December 12, 1979)

Review was Denied in the following case during the month of January:

Secretary of Labor, MSHA, v. Ozark-Mahoning Company, VINC 79-138-PM, etc., (Judge Stewart, November 29, 1979)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 10, 1980

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket Nos. PITT 76X232-P
: PITT 76X235-P
v. :
: IBMA 77-23
U.S. STEEL CORPORATION :

ORDER

The decision of the administrative law judge assessing penalties against U.S. Steel Corporation is affirmed. See, Republic Steel Corp., 1 FMSHRC 5 (1979); Kaiser Steel Corp., 1 FMSHRC 343 (1979); and our November 30, 1979 order in this case.

Frank F. Jestrab, Commissioner

A. E. Lawson
A. E. Lawson, Commissioner

Marian Pearlman Nease
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 22, 1980

SECRETARY OF LABOR, :
  MINE SAFETY AND HEALTH :
  ADMINISTRATION (MSHA) :
:
v. : Docket No. VINC 77-132-P
: IBMA 78-3
CONSOLIDATION COAL COMPANY :

DECISION

This case involves a civil penalty proceeding under section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, and contested within the administrative procedures then provided by the Department of the Interior. Those regulations required the Department's Office of Assessments to prepare and serve on the mine operator an initial order of assessment; they further provided that the operator could decline to pay the proposed assessment and request a hearing before an administrative law judge. In this case the mine operator had requested such a hearing. Thereafter, but before hearing, the operator offered to pay in full the penalty originally proposed by the Office of Assessments. The principal question presented here is whether the judge's denial of the operator's motion to adopt the original assessment of penalty as his own constituted legal error. We hold that it did not and affirm the judge's decision.

This case arises because of a fatal accident which occurred at a surface coal mine site operated by Consolidation Coal Company. A slide of material from a spoil bank at the mine site resulted in fatal injuries to a foreman-in-training. Following an accident investigation by the Mining Enforcement and Safety Administration (MESA), a notice of violation was issued charging a violation of 30 CFR §77.1006. Subsection (a) of that regulation requires that men other than those necessary to correct unsafe conditions shall not work near or under dangerous high walls or banks. The notice specifically charged that, at the time of the accident, an assistant superintendent at the mine and the foreman were performing their duties in an area between a stripping shovel and an unstable spoil bank.

In accordance with regulations then in effect, MESA's Office of Assessments issued an order assessing a penalty of $1,300 for the violation. The assessment was discussed without resolution at a conference between representatives of the mine operator and the Office of Assessments. Consolidation then requested that the matter be referred for an evidentiary hearing before an administrative law judge.

A Petition for Assessment of Civil Penalty was filed by the Office of Solicitor, Department of Interior on July 11, 1977, and sought a penalty for the alleged violation. The petition made no reference to the earlier assessment of the Office of Assessments, nor did it propose any specific dollar amount for the penalty. A copy of the petition was sent to the mine operator with an accompanying letter signed by MESA's attorney. In that letter Consolidation was advised that it could dispose of the matter "at this time" by paying the $1,300 assessment in full.

On August 4, 1977, Consolidation filed an answer denying that a violation took place and the case was assigned to an administrative law judge. During subsequent settlement negotiations, the MESA attorney apparently advised Consolidation's attorney that he would not accept payment of $1,300 as a means of disposing of the proceeding. A prehearing conference was held before the judge on September 9, 1977, at which time the attorney for Consolidation moved that the judge adopt the findings of MESA's Office of Assessments and issue a final order of the Secretary assessing a penalty of $1,300. In opposing the motion, the Solicitor expressed the view that $1,300 was an insufficient penalty, on the grounds that the gravity of the violation and the negligence of the operator justified the maximum penalty of $10,000. By written order of September 14, 1977, the judge denied the motion and scheduled the case for a hearing on the merits. Consolidation's attempt to take an interlocutory appeal from the judge's order was denied by the Board on September 28, 1977.

The case then proceeded to hearing where the parties litigated the issues of whether a violation occurred and, if so, the appropriate penalty. In a written decision issued on January 21, 1978, the judge held that a violation of 30 CFR §77.1006 occurred and found that the evidence showed that the assistant superintendent's actions near the spoil bank immediately prior to the accident were "extremely negligent and reckless in every respect." The judge assessed a $10,000 penalty.

Consolidation appealed to the Board, arguing that the judge erred in denying its motion to adopt the Office of Assessments' original assessment prior to hearing. The operator contends that its willingness to pay the original assessment of $1,300 eliminated any triable issue, rendering a hearing unnecessary. It contends that, in such circumstances, the Board's decision in Zeigler Coal Company, 7 IBMA 312 (1977), requires that the original assessment be adopted by the judge. We reject Consolidation's argument.

In Zeigler, the operator had requested a hearing on all 295 alleged violations for which MESA had sought a penalty. Thereafter, but before the hearing, the operator had offered to pay the full amount assessed by the Office of Assessments for 97 of the violations. The judge found that MESA would have accepted payment of each penalty in the original assessed amount if assessments for all of the 295 violations were voluntarily paid. Thus, in Zeigler, the Solicitor had not claimed that there was a triable issue of fact regarding the 97 violations, but rather took an "all or nothing" approach in the settlement negotiations. In those circumstances, the Board held that there was no triable issue and that the Office of Assessments' findings may be adopted by the judge if found to be appropriate. In that case the judge affirmatively adopted those findings. Here, the judge held, and we agree, that the Solicitor's request for a $10,000 penalty raised a triable issue, namely, the appropriate amount of penalty in light of the criteria for assessment of penalties set forth in section 109(a)(3) of the 1969 Act.

Furthermore, regulations of both the Office of Assessments, 30 CFR §100.7(d), and the Department's Office of Hearing and Appeals, 43 CFR §4.545(c), specified that if an evidentiary hearing were requested, the judge would determine the amount of civil penalty, if any, on a de novo basis. 1/ Thus, Consolidation was on notice of this Departmental policy at the time it requested the hearing, yet did not make its offer to pay the $1,300 until after the issues had been joined before the judge.

Accordingly, we conclude that the judge's action in denying Consolidation's motion was consistent with both the case law of the Board and the pertinent Departmental regulations that were then in effect. The decision is affirmed.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson

A. E. Lawson, Commissioner

Marian Pearlman Nease

Marian Pearlman Nease, Commissioner

1/ 30 CFR §100.7(d) provided:

(d) In assessing a penalty, the Office of Hearing and Appeals may determine de novo the fact of violation and the amount of the civil penalty, taking into consideration the six criteria specified in section 109(a)(3) of the Act.

43 CFR §4.545(c) provided:

(c) In determining the amount of civil penalty warranted the administrative law judge and the Board of Mine Operations Appeals shall not be bound by a recommended penalty of the Mining Enforcement and Safety Administration or by any offer of settlement made by either party.

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ADMINISTRATIVE LAW JUDGE DECISIONS

JANUARY 1 - 31, 1980

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 2 1980

JAMES F. CRUMBAKER, Complainant	:	Complaint of Discharge, Discrimination, or Interference
v.	:	Docket No. BARB 79-313
	:	Pyro Mine No. 11
PYRO MINING COMPANY, Respondent	:	

DECISION

Appearances: William R. Thomas, Esq., Spenard & Thomas, 18 Court Street, Madisonville, Kentucky, for Complainant;
Kirby Gordon, Esq., Gordon & Gordon, 111 Frederica Street, Owensboro, Kentucky, for Respondent.

Before : Administrative Law Judge Steffey

Pursuant to a notice of hearing issued September 21, 1979, a hearing in the above-entitled proceeding was held on November 28, 1979, in Evansville, Indiana, under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977.

Upon completion of the evidence presented by the parties, I rendered the following bench decision which is reproduced below (Tr. 281-289):

> The application or complaint, I should say, in this case was filed on March 13, 1979, and as my opening statement indicated, was filed by Mr. Crumbaker after the Secretary of Labor had made a finding that the complainant was not involved in an activity protected by provisions of Section 105(c)(1) of the Act at the time he was discharged. Therefore, I base all the findings that I shall make in my decision entirely on what the witnesses have said here today.
>
> The issue, of course, is whether Mr. Crumbaker was engaged in a protected activity under Section 105(c)(1), so as to be entitled to a finding of discrimination and a ruling that he should be given the relief provided for in Section 105(c)(3).
>
> I shall first make some findings of fact and if those facts are entirely inconsistent with some of the witnesses' testimony, I shall in the subsequent part of my decision indicate, briefly, why I have ruled in favor of one witness as against another.

The incident which led up to Mr. Crumbaker's discharge occurred on November 21, 1978. Mr. Crumbaker had come to work on the day shift and the section foreman or unit foreman on that day shift was Mr. Griffin. Mr. Crumbaker first went to the number four entry and found that it needed to have some bolts installed and he proceeded to make that his first work of the day.

After he had completed his roof bolting in the number four entry, he constructed some crossovers at the intersection of the number four entry at the last open crosscut. And after completing those, he traveled into the crosscut between the fifth and sixth entries where Mr. Griffin had made some marks, indicating that additional roof bolts should be installed.

Mr. Crumbaker was in the process of beginning to install roof bolts in the crosscut when Mr. Griffin came into the crosscut and told Mr. Crumbaker that he wanted Mr. Crumbaker to go and get his roof bolting machine loaded with an additional supply of bolts, so as to be able to bolt the number six entry . . . the face of number six entry. At that time, Mr. Crumbaker told Mr. Griffin that the crosscut was unsafe, in his opinion, until such time as the additional roof bolts had been installed.

At that point, Mr. Griffin told Mr. Crumbaker that his roof bolting machine was not where he wanted it to be and that Mr. Crumbaker should move the roof bolting machine out of the crosscut.

It appears on the basis of both Mr. Griffin's and Mr. Crumbaker's testimony that Mr. Crumbaker might have had an option to whether he should continue on through that crosscut or back out of it and go down to the number two crosscut and over to the number six entry. But, at this point, it appears that both of the parties, the section foreman and Mr. Crumbaker, were probably somewhat heated in their emotional state and Mr. Griffin did not pursue any discussion on the topic, but simply gave Mr. Crumbaker an option of either moving the roof bolting machine out of the crosscut or going to the house, which everyone agrees in the case, meant if Mr. Crumbaker did not move the roof bolting machine at that moment out of the crosscut, that he would be discharged.

Mr. Crumbaker felt strongly that it was unsafe to. . .for anyone, himself or anyone else, to go through the crosscut; therefore, he took the option of going to the telephone and calling the mine foreman's office to advise the mine foreman that he needed transportation out of the mine because he'd been discharged by Mr. Griffin. Those are the basic facts that have to be found in order for one to apply Section 105(c)(1) to them, to determine whether Mr. Crumbaker was involved in a protected activity or not.

And, of course, Section 105(c)(1) reads and I quote, "No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine * * *". And I shall stop quoting at that point, because I think that that's as far as[is] needed to apply as much of the Section as is [required] to apply the facts that we have in this case.

And I find that on the basis of the facts that Mr. Crumbaker was engaged in protected activity at the time of his discharge, because if there's any evidence in the case that's clear, it is that there was a violation of the roof control plan because the roof bolts in the crosscut between the number five and six entries were farther apart than they should have been.

They're supposed to be no more than five feet apart and even Mr. Griffin admits that they were between six and six and a half feet apart. And he conceded that in his deposition. He may have been correct in saying that they were up to seven feet apart. Now, I have [in] many cases, civil penalty cases, assessed substantial penalties for violations of the roof control plan which were no greater than the one involved in this proceeding. And I have had, in many cases, many [i]nspectors testify that more miners are killed in underground mines for violation of the roof control plans than any other cause of death and injury in mines. And therefore, if there's any kind of complaint that a miner can make which is beneficial to the preservation of the safety of the miners, it is for a man to insist that a roof control plan be followed and that roof bolts be installed before equipment or people pass through entries or crosscuts which have not been bolted in accordance with the plan.

Now, there's been testimony that the roof in the unit number three was safe and appeared sound, but [i]nspectors are constantly telling me, it's good roof that kills people because an unsafe or a hazardous looking roof gets supported, while the good roof is allowed to be unsupported and that's the time that a hunk of roof falls and injures or [k]ills someone. So, we cannot say that because Mr. Griffin walked under this unsupported roof that that made i[t] okay for everyone else to do so.

Now, I agree with Mr. Thomas that the testimony of Mr. Wilson is very helpful in substantiating the position of Mr. Crumbaker in this case. Mr. Wilson was very certain of where the power center should have been and where the trailing cables for all the equipment was and while he disagreed with both Mr.

Griffin and Mr. Crumbaker as to the location of those trailing cables, but still . . . his testimony was still supportive of the fact that Mr. Crumbaker was involved in trying to support a place in this crosscut. And Mr. Wilson's testimony shows it was his intention to go through that crosscut between the number five and number six entr[ies]and that was his way of going across the unit in order to mine or load from the number six entry, across to the number one entry. And, therefore, Mr. Wilson's testimony does support the complaint as it was stated by Mr. Crumbaker, namely that Mr. Crumbaker was entitled to assume, based on normal operating stages that the roof bolting machine was right behind . . . excuse me, the loading machine was right behind Mr. Crumbaker's roof bolting machine and that Mr. Wilson had every intention of going under that unsafe roof if Mr. Crumbaker had gone under that unsafe roof and had passed on out with the roof bolting machine to the number six entry.

The testimony of Mr. Griffin in this proceeding was extremely erratic. He changed his position several times about the location of trailing cables and whether they were supported and not supported. And I was not at all certain that he was clear in his mind as to the situation that existed at the time that Mr. Crumbaker was discharged. And I think that the discussion that occurred on the morning after Mr. Crumbaker's discharge, on November 22, were largely an effort by the mine foreman, Mr. Ramsey, to support the action which M[r]. Griffin had taken.

It's normal for one supervisor to try to sustain the act of another supervisor, because that's the only way to establish discipline in a mine or anywhere else. So, I'm not surprised that Mr. Ramsey supported Mr. Griffin. The fact that Mr. Ramsey declined to give Mr. Crumbaker a job even after Mr. Crumbaker was willing to concede that he was wrong, shows that management was not overly pleased with Mr. Crumbaker's insist[e]nce upon complying with safety regulations. And I think that the fact that Mr. Crumbaker refused to operate the shuttle car that was not in good mechanical condition would be a reason for management to be just as happy to not have that sort of man on their payroll. But the fact remains that Mr. Crumbaker has a history, based on this record, of trying to support safety in the mines and that if there's any reason at all for having Section 105(c)(1) in the Act, it is to give protection to a man who is willing to take a position as to safety in the mine. And therefore, instead of our condemning Mr. Crumbaker for his contentiousness or his inability to get along with people, I think instead we owe him an apology and we should congratulate him for being willing to [complain about unsafe conditions].

As Mr. Thomas has recognized, that sort of individual is, perhaps, not going to be liked by management, but sometimes a thorn in the flesh is a beneficial tool to bring about the kind of safety that this Act was intended to accomplish in coal mines.

I may not have touched on all the points that the arguments have, but I've tried to . . . that all the arguments have considered, but I have tried to give my reasons for finding in Mr. Crumbaker's favor.

WHEREFORE, it is ordered:

(A) The complaint filed by Mr. James F. Crumbaker is granted on the basis of my findings that Mr. Crumbaker was engaged in a protected activity under Section 105(c)(1) at the time of his discharge. And, therefore, he's entitled to the relief which is provided for in Section 105(c)(3).

(B) James F. Crumbaker is reinstated to his position of roof bolting machine operator at Pyro Mine, Number Eleven and he shall be paid back wages beginning on November 21 at ten a.m. and extending up to the present time, including interest at eight percent less $6,200 earned by Mr. Crumbaker for work for Mid-America Canning Corporation during the period covered by his discharge. 1/ The pay will be computed on the basis of nine dollars and twenty-eight cents an hour on the basis of a forty-one hour week, less insurance and state and federal taxes. Mr. Crumbaker shall also be entitled to whatever royalty and incentive pay other miners would have received for that same period. Additionally, he shall be entitled to payment for medical benefits for his family which he has personally paid during that period, and for reimbursement for all attorney's fees. 1/

(C) Finally, there shall be removed from Mr. Crumbaker's personnel file, any references to the discharge on November 21, 1978.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

1/ The provisions for offset for earnings and for reimbursement for attorney's fees were not part of my bench decision.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
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(703) 756-6210/11/12

JAN 7 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

THADEAUS MEALUS
(Shift Foreman),
Respondent

JOHN KREIDER
(Mine Superintendent),
Respondent

ROBERT REUSS,
(General Mine Superintendent),
Respondent,

ST. JOE ZINC COMPANY,
Respondent

Civil Penalty Proceedings

Docket No. YORK 79-50-M
A.O. No. 30-01185-05006A

Docket No. YORK 79-51-M
A.O. No. 30-01185-05007A

Docket No. YORK 79-52-M
A.O. No. 30-01185-05008A

Docket No. YORK 79-2-M
A.O. No. 30-01185-05003W

Balmat Mine No. 4 and Mill

DECISION AND ORDER

The Secretary moves to withdraw the three captioned section 110(c) cases and for approval of a settlement of the section 110(a) case against the corporate operator. The settlement proposed is $1600.00, or 80% of the $2,000 initially proposed against the corporate operator.

Based upon an independent evaluation and de novo review of the parties' extensive prehearing submissions, the information furnished at the intensive prehearing conference of November 20, 1979, the Secretary's subsequent investigation and the representations of the parties, I find that because of the passage of time, the unavailability of certain material witnesses, the inability of the inspector to locate the areas involved in the claimed imminent danger with a reasonable degree of precision, the dimming of witnesses' memories of certain claimed admissions as well as the fact that the underlying imminent danger closure order was assessed at only $295.00 it is unlikely:

1. That the Secretary can sustain the burden of showing that the loose ground condition for which the underlying section 107(a) order (Order No. 210043) was issued was, in fact, an imminent danger;

2. That any of the individuals charged under section 110(c) ordered miners into an imminently hazardous area solely for the purpose of removing mining equipment in light of time cards which show that these miners were primarily engaged in abating the alleged condition;

3. That the hazard presented by the loose roof condition that existed, while arguably serious, created a substantial probability of physical harm to the miners who entered the area to scale the loose ground and to remove mining equipment; or

4. That the violation of the closure order alleged in Citation No. 210051 was the result of knowing or reckless disregard for the order or the law, or was caused by anything more than confusion over the conduct permitted following issuance of the order.

For these reasons, and after taking into consideration the other statutory criteria, I conclude the motion to withdraw and to approve settlement is in accord with the purposes and policy of the act.

Accordingly, it is ORDERED:

1. That the motion to withdraw the charges against Thadeaus Mealus, John Kreider and Robert Reuss be, and hereby is, GRANTED and the petitions for assessment of civil penalties DISMISSED.

2. That the motion to approve settlement of the charge against St. Joe Zinc Company be, and hereby is, GRANTED, and that subject to payment of the amount of the settlement agreed upon, $1600.00, on or before Monday, January 21, 1980, the petition as to the corporate operator be DISMISSED.

Joseph B. Kennedy

Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 8 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	Civil Penalty Proceedings Docket No. DENV 79-27-P A/O No. 05-00302-03001
v.	
ENERGY FUELS CORPORATION, Respondent	Docket No. DENV 79-28-P A/O No. 05-00302-03002 Energy #1 & 2 Strip Mine

DECISION

Appearances: Ann M. Noble, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
John D. Coombe, & Deborah Friedman, Esqs., Holland & Hart, Denver, Colorado, for Respondent.

Before: Judge Charles C. Moore, Jr.

The two cases captioned above allege 13 violations of the Federal Mine Safety and Health Act of 1977. At the beginning of the hearing, the parties submitted a stipulation of partial settlement which I accepted on the record. Pursuant to that stipulation, a total penalty of $650 is assessed for the following citations: Citation No. 389931, Citation No. 389950, Citation No. 389959, and Citation No. 389960. Petitioner vacated Citation No. 389952 because the circumstances did not constitute a violation of the mandatory standard. Six of the citations alleged that parking brakes on various equipment were insufficient. The citation numbers are 389935, 389943, 389945, 389953, 389963, and 389965. It was agreed that the trial would be confined to Citation No. 389965 but that all of the other citations would be controlled by the results in the citation tried, including the percentage relationship between the penalty assessed by the assessment officer and the penalty assessed by me. For example, if I were to double the assessment officer's penalty as to Citation No. 389965, all of the others would also be doubled. This resulted in only three alleged violations being subject to an evidentiary hearing. They were the parking brake citation mentioned, Citation No. 389964, involving alleged unsafe U-bolt clamps on a powder truck and Citation No. 389939, involving an accumulation of material.

After the Secretary had presented its entire case as to the three citations and after Respondent had submitted most of its evidence, the parties decided to enter a further stipulation whereby the Secretary of Labor would withdraw its penalty action with respect to and consent to the vacation of all of the parking brake citations. The aforementioned parking brake citations are accordingly vacated. Respondent agreed to withdraw its challenge to Citation No. 389939 and the parties agreed that an appropriate penalty would be the original proposed assessment of $240. I approved this agreement. As to the remaining violation, Citation No. 389964, the parties agreed that the explosive hauling truck was in an unsafe condition and that a violation of the safety standard had occurred. The only issue left for me to decide was whether Respondent could be held responsible for a violation committed by the owners of an independent explosive supply company. The facts regarding the relationship between the mining company and the explosive company were stipulated and briefs were filed.

It was agreed, however, that I should stay my decision until after the Commission had decided Secretary of Labor v. Monterey Coal Company, Docket No. HOPE 78-469, etc. The Commission has issued a decision in Monterey, however, it based that decision on Secretary of Labor v. Old Ben Coal Company, Docket No. VINC 79-119, decided October 29, 1979. Petitions to review the Commission's decisions in both Monterey and Old Ben have been filed with a United States Court of Appeals, so the last word may not have been spoken on this issue.

I see no point in delaying my decision pending a court decision because the losing party will undoubtedly appeal to the Commission and the result will eventually be controlled by the court decision anyway. Nor do I see any point in adding my analyses of the precedents which go to the point of this controversy. In Old Ben and in Monterey the Commission held the owner of a mine responsible for the actions of an independent contractor even though the decision of the Secretary of Labor to cite the owner had been based on an arbitrary policy of always citing the owner for a violation committed in the mine. The decisions were made without regard to whose employees might be endangered, who would be in the best position to observe and abate the unsafe condition, or the control which the owner exercises over the independent contractor. The Commission hints that it may change its position at some future time, but it has not done so yet and in accordance with my interpretation of the two Commission decisions on this point, I will hold Energy Fuels Corporation responsible for the violation. I realize that this means that in order to avoid the possibility of a citation, the mine owner may have to inspect every vehicle that comes on to mine property, and while I am not sure that such a requirement will promote mine safety, I nevertheless think it is required by the two Commission decisions mentioned above. The negligence on Respondent's part, however, was of a lower order and a penalty of $50 will be assessed. As to the other criteria, the only information in the file is that contained in the assessment sheet and I am relying on that.

ORDER

Respondent is ordered to pay to MSHA, within 30 days a penalty in the amount of $940.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 10 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	Civil Penalty Proceedings
	Docket No. WEVA 79-358 A.O. No. 46-02208-0318V
v.	Docket No. WEVA 79-359 A.O. No. 46-02208-03019
DAVIS COAL COMPANY, Respondent	Marie No. 1 Mine

DECISION AND ORDER APPROVING SETTLEMENT

In response to the order to furnish additional information concerning the motions to approve settlement, the Regional Solicitor has declined to furnish "a current evaluation of this operator's ability to comply with the Mine Safety Law considering its financial difficulties." The Regional Solicitor claims that in reviewing a proposed settlement the advisability of a reduction in proposed penalties because of adverse business impact need not take into account or be balanced against the affirmative interest in perpetuating only safe mining operations. 1/ The logical extension of this position seems to be that mine safety is a consideration secondary to mine productivity and that the enforcement policy in effect is "all the safety consistent with production" and not "all the production consistent with safety."

These echoes of a production-oriented enforcement policy I thought were authoritatively rejected with the transfer of enforcement responsibility from the Interior Department to the Labor Department. I believe, therefore, that the view expressed by the Regional Solicitor, namely that "evaluation of an operator's financial ability to comply with the mine safety and health regulations is not" to be considered in evaluating a settlement where the principal justification

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1/ While the Act requires that adverse business impact be "considered", it does not require that it be given controlling weight or that it cannot be outweighed by the countervailing interest in continuing only those mining operations that promote mine safety.

for the reduction is adverse business impact, represents a profound misreading of the legislative intent.

Congress has declared that "the first priority" of all concerned with mine safety is protection of the health and safety of the miner. Certainly an interpretation of that intent that puts safety at risk in the interest of continued productivity runs counter to the fundamental declaration of policy contained in the Act as well as the Secretary's explicit mandate to evaluate an operator's past performance and history of compliance to ensure that mining operations do not constitute a "continuing hazard to the health or safety of miners." 30 U.S.C. §§ 814(c)(1), 818(a)(2); S. Rep. 95-181, 95th Cong., 1st Sess., at 32-33, 38-39 (1977).

As the Senate Committee Report that accompanied the 1977 Act notes: "* * * the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards." Id. at 41. How a penalty can deter future violations and ensure voluntary compliance if the operator does not have the financial resources to effect compliance is not explained. Nor is the public interest in encouraging a mining operation without the financial resources to comply with mine safety laws. Just as the purpose of the law is not to raise revenue so also its purpose is not to perpetuate unsafe or even marginally safe mining operations. In my judgment, the failure to make the evaluation called for is a violation of the Secretary's obligation to ensure a working environment substantially free of the hazards proscribed by the Act.

Under no circumstances, in my judgment, can the imposition of a token or unwarrantably low penalty be justified by the claim that the adverse business impact criteria precludes a realistic evaluation of the ongoing mine operation from the standpoint of ability to comply and to devote necessary resources to promote mine safety. Such an evaluation of an operation in serious financial difficulties is not beyond the competence and expertise of MSHA. The history and pattern of prior conduct and violations is highly predictive of the likelihood of future compliance. Simple observation should provide the basis for determining whether, for example, an operator has on hand the necessary materials to ensure compliance with its roof control plan. Consequently, I think it unfortunate that the Regional Solicitor has declined to furnish the evaluation requested.

Nevertheless, I am satisfied, at least for the present, that with the waters stirred, with the matter under review by the Commission, and with the possibility that MSHA may be held liable for the negligent execution of its duty to prevent the continuation of mining conditions that constitute an ongoing hazard to miners, the surveillance of the Marie No. 1 Mine will be intensified. Compare, Raymer v. U.S., 455 F.Supp. 165 (W.D. Ky. 1978).

As previously noted, the overall reduction proposed in these cases is only $1250.00 or one-third of the amount initially assessed. It is unlikely, therefore, that it will be determinative of whether the operator sinks or swims. Furthermore, I am impressed with the operator's representations as to the efforts he will make to achieve future compliance.

Based on my independent evaluation and *de novo* review of the violations, the matters set forth in mitigation, including the fact that the hole-through occurred while the operator was acting under an MSHA approved plan, the operator's straitened financial circumstances, and the Pikeville National Bank loan to cover immediate operating expenses, I conclude the settlement proposed is acceptable.

Accordingly, it is ORDERED that the Secretary's motions to approve settlement be, and hereby are, GRANTED. It is further ORDERED that the operator pay the settlement agreed upon, $2,325.00 on or before Friday, February 7, 1980, and that subject to payment the captioned petitions be DISMISSED.

Joseph B. Kennedy

Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

JAN 11 1980

McCORMICK SAND CORPORATION, Applicant	: Applications for Review
v.	: Docket No. LAKE 79-80-RM : Citation No. 292383-1; 5/7/79
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	: Docket No. LAKE 79-81-RM : Citation No. 292384-1; 5/7/79
	: McCormick Sand

DECISION

Appearances: Thomas J. O'Toole, Esq., Muskegan, Michigan, for Applicant; Karl Overman, Esq., Office of the Solicitor, Department of Labor, for Respondent.

Before: Administrative Law Judge Michels

These matters are before me for decision upon Applications for Review filed May 14, 1979, pursuant to provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act). Answers were filed generally denying the allegations but admitting that the challenged citations were issued. A hearing was held on September 24, 1979, in Grand Rapids, Michigan, at which the parties were represented by counsel. The parties filed posthearing briefs and proposed findings and conclusions which have been carefully considered. The proposed findings not adopted or specifically rejected herein are rejected as immaterial or not supported by fact.

The charges concern Citation Nos. 292383 in LAKE 79-80-RM and 292384 in LAKE 79-81-RM. Both are the same except that they refer to different equipment. Citation No. 292383 reads: "A continuous metallic grounding conductor was not provided between the dryer plant and the transformer safety ground" (Applicant's Exh. No. 2). Citation No. 292384 reads: "A continuous metallic grounding conductor was not provided between the shop and the transformer safety ground" (Applicant's Exh. No. 1). In both instances the inspector charged a violation of 30 CFR 56.12-25 which states: "Mandatory. All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment."

Background Facts

There is little if any controversy on the electrical grounding in use by the Respondent. Respondent business is an industrial silica sand operation. The components include a work plant, a dryer plant and a shop. Electricity is supplied by a public utility. The system used is known as a "three phase ungrounded delta system" and it is not battery operated (Tr. 7). It was grounded by pin grounds or ground electrodes at three locations: One at the wash plant near the service entrance box, another at the dryer plant and finally a third one at the shop (Tr. 5-9, MSHA Exh. No. 1). The distance between the wash plant and the dryer plant is approximately 200 feet; that between the dryer plant and the shop, about 75 feet (Tr. 28-29).

The electrical system, as it had been modified, was designed and installed by an electrical firm known as Whittaker Electric. This firm supplies electric service and equipment and has offices in Grand Rapids and Muskegon, Michigan. It employs engineers and designers (Tr. 68-69). Robert Alcala, the firms vice president in charge of construction and technical service is a graduate electrical engineer and is registered in the states of Michigan and Ohio (Tr. 136).

The electrical system which Whittaker Electric installed has ground fault indicating lights. These are designed to give a warning if a fault occurs in the system (Tr. 36). Tests were performed which showed that the resistance level of the ground was less than 25 ohms, which is within the limit set in the National Electrical Code (Tr. 33-34).

The abatement procedure, approved by MSHA, consisted of stringing an overhead wire from the wash plant to the dryer plant and there grounding it to the ground pins and another overhead wire from the dryer plant to the shop, and likewise grounding it to the ground pin (Tr. 78).

There is no dispute that Applicant's electrical circuit required a ground or equivalent protection under 35 CFR 56.12-25. There is also no question that the circuit was grounded in the sense that it was bonded to three pin grounds or ground electrodes (Tr. 8-9). Inspector Clyde Brown testified that such a ground system was in place and he never claimed that it was not a ground as the term is defined in the regulations e.g. (Tr. 42-43). He admitted that grounding in the aspect of accepting voltage would occur (Tr. 35, 40). Mr. John Kavolski an electrician and an electrical inspector for MSHA, also conceded that under the pin ground system, current with one phase going to ground, would travel through the earth (Tr. 47-48). (His further contention, was that depending upon the resistance of the earth, if the current isn't sufficient it will not trip the breakers (Tr. 48)). He agreed that the earth was part of the system and that there would be continuity in such a system (Tr. 59, 61).

The pin grounds in this instance were adequately sized according to the National Electrica Code in all respects. The Code does not require a metallic grounding system for a delta ungrounded system (Tr. 81, 94).

In substance, Applicant employed a pin ground or ground electrode system which was installed by an electrician and which met the requirements of the National Electric Code. I find, therefore, the Applicant's electric system was grounded, though not grounded according to a method which MSHA demanded.

DISCUSSION

As noted above, mandatory standard 30 CFR 56.12-25, here charged, requires that "electrical circuits shall be grounded or provided with equivalent protection." The inspector alleged in his citation that a "continuous metallic grounding conductor" was not provided.

The issue, however, is not whether a continuous metallic grounding conductor was provided. The standard clearly does not require this. It demands only that the circuit be grounded or that equivalent protection be provided. Electrical grounding is defined in 30 CFR 56.2 as meaning "to connect with the ground to make the earth part of the circuit."

The principal argument of MSHA is that an effective grounding system must be continuous. It cites standard 30 CFR 56.12-28 which mandates that the "continuity and resistance" of grounding systems is to be tested; the testimony of John Kovalski an MSHA electrical inspector; and the National Electrical Code which provides that the path to ground from circuits, equipment and conductor enclosures shall be "permanent and continuous".

The problem with the terms "continuity" and "continuous" is that they are not clearly defined in this record. Mr. Kovalski, upon whom MSHA so heavily relies, failed to elaborate on the meaning of these terms when he had the opportunity to do so (Tr. 61). Furthermore, he conceded that there could be continuity in the pin grounding system which could be tested under the regulations. He qualified this only by stating that such would not be as effective as it should be (Tr. 61).

It is evident that MSHA in referring to "continuous" means a continuous metallic conductor, but the published sources relied on do not use such language. Moreover, MSHA appears to concede that in some instances a tie to a ground can be sufficient if it is a cold water pipe system underground. This, it claims, creates a metallic grid which makes the grounding system continuous.

Finally, MSHA apparently defines the term "continuity" as meaning not only the bonding to the ground pins, but, at least where there is a three phase system, a continuous metallic path connecting all the phases to the ground.

In light of the above, it appears to me that MSHA is attempting to require performance which is not specified in the standard. 1/ The standard,

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1/ It seems to me if MSHA believes that the a continuous metallic ground conductor is a more effective and therefore a better and safer ground for the ungrounded delta system, the mandatory standards should specifically require its use.

fairly read, requires only a "ground" or its equivalent. It does not mandate a particular ground such as that mentioned in the citation, i.e., a "continuous metallic grounding conductor." The operator, moreover, has had no notice of any requirement under this standard other than to provide a "ground" or its equivalent.

In this instance the operator has provided a "ground." As noted, the standard requires only that the circuit be grounded and this the operator has done. It employed a qualified electrical contractor to install the system and the circuit met the requirements of the National Electrical Code for grounding.

Accordingly, I find and conclude that the charge in each docket of a violation of 30 CFR 56.12-25 has not been sustained and the citations should be dismissed. Further relief, as requested, is denied.

ORDER

It is ordered that Citation Nos. 292383 in LAKE 79-80-RM and 292384 in LAKE 79-81-RM be and hereby are vacated.

It is further ordered that these proceedings be dismissed.

Franklin P. Michels

Franklin P. Michels
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

JAN 14 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner
v.
CLINCHFIELD COAL COMPANY,
Respondent

Civil Penalty Proceeding

Docket Nos.	Assessment Control Nos.
NORT 78-325-P	44-00281-02018F
Moss No. 2 Mine	
NORT 78-364-P	44-00280-02022V
NORT 78-365-P	44-00280-02023V
NORT 78-366-P	44-00280-02024V
Camp Branch No. 1 Mine	
NORT 78-367-P	44-00279-02012V
Chaney Creek No. 2 Mine	
NORT 78-368-P	44-01773-02010V
Hurricane Creek Mine	
NORT 78-369-P	44-00267-02019V
Open Fork No. 2 Mine	
NORT 78-376-P	44-00241-02013F
Lambert Fork Mine	

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, Department of Labor, for Petitioner;
Gary W. Callahan, Esq., Lebanon, Virginia, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to written notice dated August 16, 1978, as amended August 28, 1978, a hearing in the above-entitled consolidated proceeding 1/ was held on November 28 and 29, 1978, in Abingdon, Virginia, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

1/ At the time the notice of hearing was issued, MSHA's Petition for Assessment of Civil Penalty in Docket No. NORT 78-376-P was a part of this consolidated proceeding, but on November 8, 1978, counsel for MSHA filed a motion for approval of settlement in Docket No. NORT 78-376-P. I issued on November 14, 1978, a decision approving the settlement agreement reached by the parties with respect to MSHA's Petition in Docket No. NORT 78-376-P and severed all matters concerning the issues in Docket No. 78-376-P from this consolidated proceeding.

All of the Petitions for Assessment of Civil Penalty in the docket numbers listed in the caption of this decision were filed on June 22, 1978, except the Petition in Docket No. NORT 78-325-P which was filed on May 12, 1978. All of the Petitions seek assessment of a civil penalty for a single violation of the mandatory health and safety standards except for the Petition filed in Docket No. NORT 78-366-P which seeks assessment of civil penalties for two alleged violations.

Counsel for MSHA filed on February 26, 1979, a posthearing brief with respect to the issues raised in each docket except for Docket Nos. NORT 78-366-P and NORT 78-368-P. Counsel for MSHA did not file briefs in Docket Nos. NORT 78-366-P and NORT 78-368-P because, during the hearing, he had orally made motions for approval of settlement with respect to those two cases. Counsel for Respondent filed posthearing briefs on March 1, 1979, with respect to the issues raised in all dockets except for the issues raised in the two cases in which the parties had entered into settlement agreements. Counsel for Respondent did not file a brief in Docket No. NORT 78-369-P, but there is nothing in the official files to show whether the failure to file a brief in that docket was by inadvertence or for some other reason.

Issues

The issues raised by the Petitions for Assessment of Civil Penalty are whether violations of the mandatory health and safety standards occurred and, if so, what monetary penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. Four of the six criteria may usually be given a general evaluation, but in this particular proceeding only two of the criteria may readily be considered on a general basis so as to make such generalized consideration applicable to all of the violations which were alleged in each docket. The two criteria which may be given a general evaluation are the size of Respondent's business and the question of whether the payment of penalties would cause Respondent to discontinue in business. The remaining four criteria, namely, Respondent's good faith effort to achieve rapid compliance, Respondent's negligence, if any, the gravity of the alleged violations, and Respondent's history of previous violations, will be considered on an individual basis in each docket when the parties' evidentiary presentations are hereinafter reviewed. The two criteria concerning the size of Respondent's business and whether the payment of penalties would cause Respondent to discontinue in business are considered below.

Size of Respondent's Business

Five of Respondent's mines were the subject of the Petitions filed by MSHA in this consolidated proceeding. Respondent's Moss No. 2 Mine is one of the largest coal mines in the State of Virginia. It employs approximately 350 miners to produce from 2,500 to 3,000 tons of coal per day (Tr. 15). Respondent's Camp Branch No. 1 Mine employs about 185 miners to produce approximatley 1,200 tons of coal per day (Tr. 254-255). Respondent's Chaney Creek No. 2 Mine employs approximately 150 miners to produce about 1,300 tons of coal per day (Tr. 477). Respondent's Open Fork No. 2 Mine employs about 150 miners to produce approximately 1,400 tons of coal per day (Tr. 524). There are no data in the record to show the size of Respondent's Hurricane Creek Mine because the Petition filed with respect to that mine was the subject of a motion for approval of settlement. Since the data already in the record supported a finding that Respondent operates a large coal business, no evidence was given with the respect to the size of Respondent's Hurricane Creek Mine. It was stipulated that Respondent is a part of the Pittston Coal Group (Tr. 16). On the basis of the foregoing facts, I find that Respondent operates a large coal business and that any penalties which may hereinafter be assessed in this proceeding should be in an upper range of magnitude insofar as they are determined under the criterion of the size of Respondent's business.

Effect of Penalties on Operator's Ability to Continue in Business

Respondent's counsel did not present any evidence at the hearing with respect to Respondent's financial condition. In Buffalo Mining Co., 2 IBMA 226 (1973), and in Associated Drilling, Inc., 3 IBMA 164 (1974), the former Board of Mine Operations Appeals held that when a Respondent fails to present any evidence concerning its financial condition, a judge may presume that payment of penalties would not cause Respondent to discontinue in business. In the absence of any specific evidence to the contrary, I find that payment of penalties will not cause Respondent to discontinue in business.

The Settlement Agreements

Docket No. NORT 78-366-P (Camp Branch No. 1 Mine)

Order No. 1 CAG (7-46) September 6, 1977, section 75.400 (Exhibit M-18)

Order No. 1 CAG cited a violation of section 75.400 because float coal dust and loose coal accumulations existed in depths ranging from 1/8 inch to 2 inches along various conveyor belts for a distance of about 4,800 feet. The Assessment Office waived the formula normally used in assessing penalties and made findings as to the six criteria to support a proposed penalty of $4,000.

Counsel for MSHA stated that Respondent had offered to pay a penalty of $2,000 in settlement of the violation of section 75.400 alleged in Order No. 1 CAG. MSHA's counsel said that he was willing to accept the offer of settlement because MSHA personnel who were acquainted with the facts at the time Order No. 1 CAG was written had explained to him that a very serious roof problem had developed in a portion of the mine. Management had consulted with MSHA personnel and everyone agreed that the section with the bad roof should be abandoned because of the deteriorating condition of the roof. While the mine's personnel were engaged in removing the conveyor belt so that the section could be abandoned, the loose coal and float coal dust accumulated, but the urgency of the abandonment operations was believed to have priority over the cleaning up of the accumulations. MSHA's counsel noted that the Assessment Office did not have the aforementioned extenuating facts in its possession when it proposed a penalty of $4,000 for the violation cited in Order No. 1 CAG (Tr. 463-466).

As has been found above, Respondent is a large operator. There was a good faith effort made to achieve rapid compliance with respect to Order No. 1 CAG. Respondent was nonnegligent in the circumstances. Exhibit M-12 shows that Respondent has paid penalties for 43 prior violations of section 75.400 at its Camp Branch No. 1 Mine. Exhibit M-12 also shows, however, that Respondent violated section 75.400 only three times during the first 8 months of 1977. That is an especially good trend in reducing the number of violations of section 75.400 and warrants acceptance of Respondent's proposed settlement with respect to the violation of section 75.400 alleged in Order No. 1 CAG.

Order No. 2 CAG (7-47) September 19, 1977 section 75.301-4 (Exhibit M-21)

Order No. 2 CAG alleged that section 75.301-4 had been violated because the velocity of the air reaching the working face of the No. 2 pillar split in the 2 Right Section off the 8 Left Mains was too low to be measured with an anemometer. The Assessment Office waived the usual formula employed for determining civil penalties and made findings as to the six criteria to support a proposed penalty of $4,000.

MSHA's counsel stated that Respondent had offered to settle the issues raised by Order No. 2 CAG by paying a civil penalty of $2,500. Although the Camp Branch No. 1 Mine releases some methane, there have been no explosive quantities of methane found in the mine. Consequently, the primary factor to be considered in assessing a penalty is that absence of a sufficient air velocity exposed the miners to the possibility of contracting pneumoconiosis. In such circumstances, MSHA's counsel expressed the opinion that the Assessment Office had not shown sufficient gravity to warrant imposition of a penalty of $4,000 and he moved that the settlement offer of $2,500 be approved (Tr. 466-467).

As previously shown above, Respondent is a large operator. There was a rapid good faith effort to achieve compliance as the alleged violation was corrected within a period of 45 minutes. There was ordinary negligence. Exhibit M-13 shows that Respondent has paid penalties for four previous violations of section 75.301-4 at its Camp Branch No. 1 Mine, but Exhibit M-12 also reflects that Respondent has not violated section 75.301-4 at its Camp Branch No. 1 Mine since November 30, 1976. In such circumstances, the facts support approval of Respondent's offer to pay a penalty of $2,500 for the violation of section 75.301-4 alleged in Order No. 2 CAG.

Docket No. NORT 78-368-P (Hurricane Creek Mine)

Notice No. 1 VH (7-28) August 1, 1977 section 75.200 (Exhibit M-27)

Notice No. 1 VH alleged that a violation of section 75.200 had occurred because Respondent had failed to comply with its roof-control plan in that the face of the left crosscut off No. 3 entry had been advanced 29 feet but only two rows of roof bolts had been installed in the last 14 feet of supported roof. The Assessment Office waived the formula which is normally used in determining penalties and made findings with respect to the six criteria to support a proposed penalty of $1,500.

MSHA's counsel stated that Respondent had offered to settle this alleged violation of section 75.200 by paying a penalty of $1,250. MSHA's counsel said that the only extenuating circumstances were that the roof appeared to be sound and that the violation consisted of Respondent's failure to install two additional rows of roof bolts in an area from which coal had recently been extracted by the continuous-mining machine. The violation had not apparently exposed anyone to a serious threat and MSHA's counsel expressed the belief that a penalty of $1,250 was adequate in the circumstances (Tr. 468-472).

As has been found above, Respondent is a large operator. There was a good faith effort to achieve rapid compliance because the alleged violation was corrected within an hour after the notice was written. There was ordinary negligence. Exhibit M-26 shows that Respondent has paid penalties for 12 prior violations of section 75.200 at its Hurricane Creek Mine, but only one violation occurred in 1975, none in 1976, and only one occurred in 1977 prior to the violation alleged in Notice No. 1 VH. I do not condone any violations of section 75.200, but the evidence shows that Respondent is making an effort to eliminate violations of section 75.200 at its Hurricane Creek Mine. The aforesaid findings warrant approval of Respondent's offer of settlement with respect to the violation of section 75.200 cited in Notice No. 1 VH.

The Contested Cases

Docket No. NORT 78-325-P (Moss No. 2 Mine)

Notice No. 1 WJT (6-85) December 21, 1976 section 75.1403-10 (Exhibit M-7)

Findings. Section 75.1403-10, to the extent here pertinent, requires that a permissible trip light or other approved device, such as reflectors, be used on the rear of coal cars pulled by locomotives. Respondent violated section 75.1403-10 because no light or reflector had been placed on the last or 17th car of a line of loaded coal cars being pulled in Respondent's mine (Tr. 14). The violation was very serious because the train of cars became stalled on the main track leading to the dumping point and the unlighted end of the train of cars was hit by another locomotive pushing an empty car (Tr. 41; 152). The impact of the collision drove the empty car back upon the operator of the locomotive. The empty car came to rest upon the locomotive operator and caused his death by suffocation (Tr. 60-61; 80-81). Respondent was grossly negligent in failing to provide a proper reflector on the end of the train of loaded coal cars (Tr. 44-45; 47).

Discussion and Conclusions. Respondent's brief (pp. 8-9) contends that MSHA failed to prove that the death of the locomotive operator was the result of Respondent's failure to provide a reflector or other light on the end of the 17th car of coal. Respondent argues that the locomotive which was pushing the empty car was 1 inch higher than the empty car and that the operator of the locomotive would have had to have been crouched down to avoid the cold air in the track haulageway and would have had to have been unobservant to have run into the rear of a loaded coal car which was 8 feet wide and 30 inches high. It is true that no one saw the operator of the locomotive just before the collision and it is possible that he was not alert in performing his job, but the coal car was not a bright color and it is a fact that the end of the car was not equipped with a light or reflector which might have caught the locomotive operator's attention in time for him to have stopped before colliding with the end of the coal car (Tr. 117; 130; 148).

Respondent's superintendent testified that before becoming a supervisor, he had been a locomotive operator for about 20 years, and that it is the practice for motormen to crouch low in the locomotives to avoid the cold air in the haulageway and thereby get only occasional glimpses of the track in front of them (Tr. 135; 140-141; 148). It is management's obligation to train its operators to look where they are going and to provide them with such shields or goggles as may be necessary to withstand the cold air and still enable them to operate the locomotives in a safe manner. The deceased operator may well have been following the example of the superintendent and may have assumed that nothing would be on the track in front of him. Nevertheless, I must reject the defense that Respondent cannot be held to be negligent because of the claim that the deceased operator of the locomotive would have seen the unlighted stationary coal car if he had been observant.

It is true, as Respondent notes in its brief (p. 6), that one of MSHA's witnesses expressed the belief that a trip light would not have helped the deceased operator of the locomotive (Tr. 69). On the other hand, two of MSHA's witnesses believed that a trip light would have assisted in preventing the fatal accident (Tr. 117; 130). In fact, one inspector believed that the fact that there was no trip light and the fact that the deceased locomotive operator was pushing (instead of pulling) an empty car were the direct causes of the fatal accident (Tr. 131-132). Respondent can hardly expect to avoid liability for the fatal accident by claiming that it had failed to train the deceased operator of the locomotive to look where he was going and had also failed to instruct him in safe operating procedures, that is, to pull cars on the main line instead of pushing them (Tr. 132).

MSHA's brief (p. 9) recommends that a penalty of $9,000 be assessed for this violation of section 75.1403-10. I believe that a penalty of $9,000 is warranted. None of the facts associated with the fatal accident are favorable to Respondent's management. The locomotive which was stalled was not functioning properly at the time the dispatcher suggested to its operator that he take a trip of 17 loaded cars to the loading point (Tr. 94). The locomotive had just come from the repair shop and should have been returned there for further repairs (Tr. 92). The operator of the locomotive which stalled did not report to the dispatcher that the train was stopped (Tr. 97). There was speculation that the locomotive operator's failure to call the dispatcher was related to a discharged battery, but MSHA's electrical inspector testified that locomotive phones or radios depend on the trolley wire for power rather than batteries (Tr. 96; 122). In any event, the operator of the stalled locomotive was able to talk to the dispatcher after the fatal accident occurred (Tr. 101). Thus, the events leading up to the occurrence of the fatal accident all indicate that Respondent's management had failed to train its personnel in proper safety procedures. The lack of lights or reflectors on the end of the 17th car was not the only negligent act which caused the fatal accident, but the unmarked car was certainly a contributing cause of the accident and may have been the sole reason for the deceased operator's failure to see the 17th car in time to avoid the collision which resulted in his death.

Respondent's brief (p. 6) argues that failure to have a trip light or reflector on the end of the loaded car was not a serious violation, but no safety violation can be judged in a vacuum. The failure to have a reflector on a coal car in a well-lighted place is nonserious, but when that same car is stalled in total darkness on a main track in a coal mine, where 10 tram locomotives and six supply locomotives are operated, the failure to equip the car with a reflector is a very serious violation (Tr. 149).

In assessing a penalty of $9,000, I am bearing in mind that a large operator is involved (Tr. 15-16), that there was a good faith effort to achieve rapid compliance after the violation was cited (Tr. 52), and that Respondent has violated section 75.1403-10 on only two previous occasions (Exh. M-1, p. 5). The two criteria of gravity and negligence require that a high penalty be assessed. It should be noted that Respondent repeatedly failed to provide trip lights. On October 10, 1973, an inspector issued a notice to provide safeguards requiring Respondent to install trip lights on the ends of coal cars (Exh. M-2; Tr. 22). Yet, over 3 years later, Respondent was using coal cars in its mine without equipping them with proper reflectors (Tr. 130; 133). I consider the failure to comply with section 75.1403-10 in such circumstances to be the result of gross negligence and the penalty of $9,000 recommended by MSHA will hereinafter be imposed for this violation.

Docket No. NORT 78-364-P (Camp Branch No. 1 Mine)

Notice No. 1 CAG (7-38) June 21, 1977 section 75.317 (Exhibit M-13)

Findings. Notice No. 1 CAG dated June 21, 1977, alleged that Respondent had violated 30 CFR 75.317 because (Exh. M-13):

> Five foremen entered underground with flame safety lights that had not been tested in a gas box provided for that purpose to insure that such lamps were in a permissible condition and could not ignite the outside atmosphere of such lamps. This violation occurred despite the fact that this requirement of the regulations was discussed with mine management on June 15, 1977, with the hope that this requirement would not be violated.

Section 75.317 states as follows:

> Each operator shall provide for the proper maintenance and care of the permissible flame safety lamp or any other approved device for detecting methane and oxygen deficiency by a person trained in such maintenance, and, before each shift, care shall be taken to insure that such lamp or other device is in a permissible condition.

The inspector's notice alleged that Respondent's foremen had not tested their flame safety lamps in a gas box to insure that such lamps were in a permissible condition. There is nothing in the language of section 75.317 which requires that a flame safety lamp be tested in a gas box to insure permissibility. In fact, the unrebutted testimony of Respondent's witness Strong, who has a mining engineering degree (Tr. 338), shows that once the light in a flame safety lamp has been extinguished by being placed in a box containing methane, the lamp may be rendered nonpermissible by such testing and the lamp should then be removed from the gas box and be disassembled, examined, defective parts, if any, replaced, and reassembled in order to restore the lamp's permissibility (Tr. 342). 2/

The inspector's notice citing a violation of section 75.317 is based solely on an allegation that Respondent's foremen had not checked the permissibility of their lamps by testing them in a gas box. Since the evidence shows that placing flame safety lamps in a gas box may destroy their permissibility instead of insuring permissibility, I find that use of a gas box for testing permissibility is an undesirable procedure. Therefore, the alleged violation of section 75.317 cited in Notice No. 1 CAG cannot be sustained.

Discussion and Conclusions. MSHA's brief (p. 3) argues that a violation of section 75.317 was proven because it is undisputed that all five foremen failed to check the permissibility of their lamps by placing them in the gas box. As I have already found above, failure to place a flame safety lamp in a gas box to test permissibility is not a violation of section 75.317. MSHA's brief attempts, alternatively, to prove that a violation of section 75.317 occurred by alleging that at least one of the five foremen admitted that he had not cleaned his flame safety lamp before going underground (Tr. 307).

There are several reasons for rejecting MSHA's claim that Notice No. 1 CAG should be sustained because one of the foremen admitted that he had not cleaned his flame safety lamp. First, there is nothing in the pleadings to show that Respondent was advised that the inspector was claiming that a violation had occurred because of the failure of one foreman to clean his lamp

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2/ According to 30 CFR 21.6(a)(2)(ii), MSHA's laboratory personnel reexamine the interior of a lamp to redetermine its permissibility after a lighted lamp has been extinguished by having been placed in a gaseous atmosphere.

before going underground. The former Board of Mine Operations Appeals held in Old Ben Coal Co., 4 IBMA 198, 208 (1975), that MSHA must give Respondent notice of the violation which is being charged so that it can prepare a proper defense. I cannot accept MSHA's attempt to sustain a violation of section 75.317 based on an entirely different reason from the one alleged by the inspector when he wrote the notice which is the basis for the Petition for Assessment of Civil Penalty filed in Docket No. NORT 78-364-P.

The second reason for rejecting MSHA's claim that a violation of section 75.317 occurred because one foreman had not cleaned his lamp before going underground is that the inspector himself knew little about the condition of the flame safety lamps. The inspector first stated that he did not examine the lamps to determine whether they had been cleaned (Tr. 260). Thereafter he claimed that he could on the basis of experience and general observation attest to the fact that all five flame safety lamps were dirty (Tr. 294). Yet, one of Respondent's foremen testified that he had cleaned his lamp and had lighted it while the inspector was in the mine office (Tr. 319), so there is evidence in the record to rebut the inspector's claim that his general observation was sufficient for him to conclude that all five lamps were dirty. Additionally, one of the witnesses subpoened by MSHA's counsel testified that he was with the inspector and had observed the lamps, but that he could not say that they were either dirty or clean (Tr. 308).

That same subpoened witness introduced the only specific facts in the record about a dirty lamp by testifying that one of the foremen stated that he had not cleaned his lamp before going underground (Tr. 307). The failure of one foreman to clean his lamp falls short of proving that the lamp was nonpermissible. The foregoing conclusion is supported by the testimony of one of Respondent's foremen who said that he sometimes cleans his lamp every other shift. He testified that the lamp held enough fuel to last for two shifts and that since no one used the lamp but him, he was sure it was permissible for use on two shifts. Thus, the failure to clean a lamp immediately prior to going underground does not necessarily mean that the lamp is nonpermissible. It is true that the flame in one of the five lamps could not be ignited, but the inspector said that the failure of the lamp to ignite had nothing to do with his claim that a violation of section 75.317 had occurred (Tr. 292).

Respondent's brief (pp. 7-9) argues that Notice No. 1 CAG should be vacated because the inspector issued the notice under the unwarrantable failure provisions of section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969 and Respondent claims that the inspector failed to show that the violation was unwarrantable. The former Board's holdings that the validity of a notice issued under the 1969 Act is not an issue in a civil penalty proceeding has been upheld by the Commission in MSHA v. Wolf Creek Collieries Co., Docket No. PIKE 78-70-P, 79-3-11, and in Pontiki Coal Corp. v. MSHA, Docket No. PIKE 78-420-P, 79-10-13. Therefore, it would be improper for me to address Respondent's argument that Notice No. 1 CAG was shown by the evidence in this case to have been erroneously issued under section 104(c)(1) of the 1969 Act.

As a part of my finding that section 75.317 is not violated when an operator fails to test the permissibility of a flame safety lamp by placing it in a gas box, it is desirable, however, that I discuss the ramifications which accompany an inspector's failure to understand the intended use of a gas box. The inspector placed a lot of emphasis on the fact that he had warned Respondent's management on June 15, 1977, that they were not using the gas box to test permissibility of flame safety lamps (Tr. 256). The inspector advised management on June 15 that he would make further checks to determine whether they were testing permissibility of the lamps by placing them in the gas box. On June 21, 1977, the inspector returned to the mine and wrote the notice here involved after observing five foremen go underground without having tested their lamps in a gas box (Tr. 251).

Respondent's mine superintendent testified that they did test the flame safety lamps by placing them in the gas box for a short period of time after the notice was issued, pending consideration of the matter by Respondent's safety department. The safety department subsequently advised the superindendent that testing the lamps in the gas box was not required for compliance with section 75.317 and all further testing by use of the gas box was discontinued (Tr. 347).

The inspector issued the notice here involved at 12:15 a.m. when Respondent's superintendent was at home because the superintendent works the day shift instead of the midnight-to-8 a.m. shift during which the notice was issued. Respondent's superintendent testified that if he had been at the mine, he would not have permitted the lamps to be tested on June 21 by placing them in the gas box because Respondent did not then have a tank of methane at the mine for injection of gas into the box. For that reason, the foremen on June 21, in order to satisfy the inspector's requirement that the lamps be tested by placing them in the gas box, used a tank of acetylene to test the lamps. The superintendent stated that acetylene is much more explosive than methane and that it was hazardous for the men to use acetylene for the purpose of testing permissibility by insertion of the lamps into the box (Tr. 347).

The evidence also shows that Respondent did not have the gas box at its Camp Branch No. 1 Mine for the purpose of testing permissibility of flame safety lamps. A gas box is used by the State of Virginia as part of the testing given to persons who wish to become certified mine foremen. The purpose of the gas box is to have the prospective foremen demonstrate how the flame in the lamp will react when it comes into contact with methane in the mine. A halo effect forms around the flame as a warning to a person carrying the lamp that methane is present (Tr. 310; 321). Respondent's superintendent testified that the gas box was kept at the mine in a room used by State and Federal personnel to test employees for competency in performing gas tests, rather than for the purpose of checking permissibility of flame safety lamps (Tr. 345). Therefore, the inspector misunderstood the reason that the gas box was kept at the mine and consequently incorrectly stated in his notice that Respondent failed to check permissibility of the flame safety lamps by placing them in "a gas box provided for that purpose"

(Exh. M-13). Moreover, the gas box was not kept near the mine office where the flame safety lamps were maintained, but was kept in a building which was about a half mile from the mine office (Tr. 345). That location in itself was an indication that Respondent did not keep the gas box at the mine for the purpose of testing permissibility of flame safety lamps.

A final reason for declining to uphold the inspector's citation of a violation of section 75.317 lies in the fact that the inspector admitted that not all operators have gas boxes and that permissibility can be established at mines without gas boxes simply by disassembling the lamps, inspecting them, cleaning them, replacing defective parts, if any, and reassembling them. The inspector's concession that cleaning and inspecting are sufficient to establish permissibility if an operator has no gas box, but that placing them in a gas box is required when the operator has a gas box, would produce a disparity in the degree of permissibility and safety of flame safety lamps, depending on which operators have gas boxes at their mines (Tr. 292-293). Fortunately, the evidence in this proceeding shows that gas boxes should not be used at all to test permissibility, so permissibility of flame safety lamps at all mines is assured by careful cleaning and examining of the lamps before they are taken underground. Specifically, permissibility may be insured as required by section 75.317 by (1) opening the lamps with a special magnet, (2) checking and cleaning the leather gasket, gauze ring, asbestos rings, pyrex globe, gauzes, nuts, boot, and bonnet, and (3) replacing any of the aforementioned parts, prior to reassembly, which show any sign of defectiveness (Tr. 339-342).

The testimony of John W. Crawford, who was Respondent's director of health and safety at the time the hearing was held, and who had formerly been the district manager of MSHA's Norton Office and assistant administrator of the Mining Enforcement and Safety Administration, was also significant. He stated that it is not Pittston Company's policy to use a gas box to test for permissibility because that kind of test is not required by section 75.317, that it was not the practice of the inspectors, when he was district manager, for them to use a gas box to test permissibility of their flame safety lamps, and that the gas box was supposed to be used to tune one's eye to the appearance of the flame when it was subjected to a gaseous atmosphere (Tr. 325-329).

For the foregoing reasons, I find that the violation of section 75.317 alleged in Notice No. 1 CAG dated June 21, 1977, was not proven. Therefore, MSHA's Petition for Assessment of Civil Penalty in Docket No. NORT 78-364-P will hereinafter be dismissed because the sole civil penalty sought to be assessed in that docket was the violation of section 75.317 alleged in Notice No. 1 CAG issued June 21, 1977.

Docket No. NORT 78-365-P (Camp Branch No. 1 Mine)

Order No. 2 CAG (7-15) January 31, 1977 section 75.400 (Exhibit M-15)

Findings. Section 75.400 provides that coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings. Respondent violated section 75.400 because float coal dust and loose coal had been permitted to accumulate in two areas of Respondent's mine. One location was inby the 8 Left Mains tailpiece for a distance of 500 feet. The second location was inby Survey Station No. 3006 in the No. 3 entry of the 3 Right off 8 Mains and in the Nos. 1 and 2 entries of 2 Right off 8 Mains. In both the 3 Right and 2 Right sections, the accumulations existed at crosscuts for a distance of 1,100 feet. The accumulations ranged in depth from 1/4 inch to 20 inches (Tr. 355-356). The accumulations constituted a serious violation because the float coal dust could have propagated an explosion if one had occurred.

A trolley wire constituted a potential ignition source in the first area of accumulations in the 8 Left Mains and at least one high-voltage disconnect switch was a possible ignition source in the second area of accumulations in 2 Right and 3 Right Sections. The ignition sources would have posed a threat of an explosion if methane in an explosive quantity had accumulated in the vicinity of the trolley wire or disconnect switch (Tr. 371). Float coal dust, if thrown into suspension, may explode in the presence of a spark.

At the time the order was written, the areas where the accumulations were observed were traveled mostly for inspections and served as a transfer point for coal produced from other parts of the mine, but the accumulations had originally occurred during active mining operations and had remained a potential explosive threat for a period of several months. The violation was the result of gross negligence because the coal accumulations were being deliberately left in the areas cited in Order No. 2 CAG because Respondent's continuous-mining equipment then being used was unable to extend far enough to extract coal from crosscuts and clean up the residual coal left at such break-through points (Tr. 364-365; 432). Moreover, one of the reasons that the accumulations were not cleaned up was that Respondent was unable to get its roof-bolting equipment into the areas where the accumulations existed for the purpose of installing roof bolts. For the foregoing reason, it would have been hazardous for Respondent to have cleaned up the accumulations because such clean-up would have required that miners work under unsupported roof (Tr. 369).

Discussion and Conclusions. Respondent's brief filed in Docket No. NORT 78-365-P recommends for my consideration a large number of findings of fact, but does not contain a discussion of the six criteria or make any recommendations as to whether a penalty should or should not be assessed. Petitioner's brief contends that a maximum penalty of $10,000 should be assessed because the coal accumulations had been in existence for a long period of time and were associated with Respondent's failure to comply with the provisions of its roof-control plan (Br., p. 5).

There is some merit in Petitioner's argument that a maximum penalty should be assessed for this violation of section 75.400. Even the two witnesses presented by Respondent corroborated the inspector's statement that accumulations existed (Tr. 413; 430-432). Still, it is a fact that the inspector was unable to show that the ignition sources were located within the actual area of the accumulations. Therefore, the inspector felt that the likelihood of an explosion depended on the presence in the vicinity of the trolley wire or disconnect switch of an explosive quantity of methane. Respondent's Camp Branch No. 1 Mine has historically liberated such a small amount of methane, that it has not been detected with a hand-held methanometer, but from .01 to .03 of 1 percent of methane has been detected through analyses of bottle samples (Tr. 376). Nevertheless, all mines are classified as gassy under the Act and a mine which liberates any methane could have a concentration large enough to cause an explosion which, in turn, could be propagated by the existence of float coal dust in quantities such as were described in the inspector's order (Tr. 378). As the Commission pointed out in its decision in MSHA v. Old Ben Coal Co., 79-12-4, one of the primary purposes of the Act is to prevent death and injury from fire and explosions. In that case, the Commission also held that the mere existence of combustible materials constitutes a violation of section 75.400. Consequently, the inspector no longer has to satisfy the prerequisites set forth by the former Board of Mine Operations Appeals in Old Ben Coal Co., 8 IBMA 98 (1977), in order to prove that a violation of section 75.400 occurred.

Despite the foregoing considerations, the inspector appeared to have considerable difficulty in supporting his belief that the accumulations were very hazardous in this instance because he was faced with the remoteness of the ignition sources to the accumulations and with the fact that he had observed no defects in the physical condition of those potential ignition sources (Tr. 362; 381-382). A countervailing consideration is the fact that one of Respondent's witnesses agreed with the inspector that the disconnect switch was supposed to be in a neutral split of air, but through a mistake in the way the ventilation curtains had been installed, the disconnect switch was in return air (Tr. 383; 440). Therefore, the area was more susceptible to a possible methane accumulation than it would have been if the area had been properly ventilated. When all aspects of the accumulations are evaluated, the only conclusion which one can reach is that the accumulations constituted a serious threat to the miners' safety.

A consideration of Respondent's negligence shows that Respondent deliberately failed to clean up the accumulations because the mining equipment it was then using would extend only 200 feet and that was not a sufficient distance to permit the crosscuts to be completed without leaving accumulations of loose coal at such break-through points (Tr. 442-443; 451). A mitigating factor about the equipment is that Respondent recognized the equipment's hazardous limitations and has now ceased to use that type of equipment in its mine in order to avoid occurrence of the kinds of accumulations which were cited in the inspector's order (Tr. 460). As Petitioner notes in its brief, Respondent's failure to support the roof in the area of the accumulations was another aspect of the coal accumulations which augumented both the seriousness and negligence associated with occurrence of the coal accumulations.

The extent of the accumulations is emphasized by the fact that three consecutive shifts of miners worked around the clock for 3 days in applying enough rock dust in the areas cited in the inspector's order to render the accumulations sufficiently inert to eliminate their threat to the miners' safety (Tr. 455-456).

In view of the fact that the accumulations were extensive and were the result of a deliberate pattern of mining which necessarily resulted in such accumulations, a penalty of $8,000 is warranted and will hereinafter be imposed. The penalty of $8,000 also takes into consideration that Respondent is a large operator and that Respondent's Camp Branch No. 1 Mine has an unfavorable history of previous violations because Exhibit No. M-12 shows that 41 previous violations of section 75.400 have occurred at the Camp Branch No. 1 Mine. Since 10 of those 41 violations occurred in 1976, there is no mitigating downward trend in Respondent's proclivity for violating section 75.400. Therefore, assessment of a large penalty of $8,000 seems to be necessary in this instance to achieve the deterrent effect which imposition of civil penalties was intended to accomplish.

Docket No. NORT 78-367-P (Chaney Creek No. 2 Mine)

Notice No. 1 KCK (7-95) November 17, 1977 section 75.501-2(2) (Exhibit M-24)

Findings. Section 75.501-2(2) provides in pertinent part that all hand-held drills taken into or used inby the last open crosscut shall be permissible. Respondent violated section 75.501-2(2) because its electricians were using a 3/8-horsepower, hand-held nonpermissible drill inby the last open crosscut to drill holes in headless bolts to facilitate their removal by means of a screw extractor or "easy out". The violation was moderately serious because methane emissions of up to .06 of 1 percent have been detected in Respondent's Chaney Creek No. 2 Mine, but methane checks were being made at the time the violation was cited and power for the hand-held drill was being obtained from the continuous-mining machine which would have deenergized the power for the electric drill if as much as 2 percent of methane had accumulated in the atmosphere where the drilling was being done. Respondent was grossly negligent for using the hand-held drill because the electricians knew that it was a nonpermissible drill and were obligated to evaluate the conditions under which they were deliberately using a drill which emitted sparks when it was running (Tr. 478; 486; 491; 508; 515).

Discussion and Conclusions. Respondent's brief raises two primary defenses with respect to MSHA's claim that a violation of section 75.501-2(2) occurred. Respondent's first defense (Br., pp. 5-6) is based on the preliminary observation that using a nonpermissible drill is less dangerous than using a cutting torch or welding equipment under ground. Respondent's argument continues by pointing out that section 75.1106 would have permitted Respondent to use a welding machine for removal of the headless bolts, whereas section 75.501-2(2) entirely prohibits the removal of the bolts by a less dangerous means, namely, use of a nonpermissible hand-held drill. The mere fact that the regulations permit cutting and welding to be done under certain controlled conditions does not remove the danger associated with use of nonpermissible equipment. As the inspector noted, it is always possible for methane to accumulate in an explosive quantity despite the fact that only .06 of 1 percent of methane was detected by the inspector at the time he wrote Notice No. 1 KCK (Tr. 480; 486; 491).

Respondent had an option of using a welding machine to remove the bolts, but if Respondent had done so, it would have been obligated to follow the precise provisions of section 75.1106 which require that a check for methane be maintained on a continuous basis. Such welding or cutting is entirely prohibited if as much as 1 percent of methane is encountered and Respondent must have present at the welding or cutting site a suitable supply of rock dust or fire extinguishers. Respondent's witnesses conceded that they were not continuously testing for methane with a hand-held methane detector and, while Respondent did have fire-suppression equipment on the continuous-mining machine and a water hose, Respondent did not have rock dust or fire extinguishers as required by section 75.1106 (Tr. 504; 509). Therefore, Respondent was not taking precautions equivalent to those required by section 75.1106 when welding or cutting is being done. Since Respondent had not taken the same precautions which are required by section 75.1106 when welding or cutting is being done, Respondent cannot expect its use of the nonpermissible drill in violation of section 75.501-2(2) to be condoned.

Respondent's second defense (Br., pp. 7-9) is that the inspector's notice was improperly issued under the unwarrantable failure provisions of section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969. The Commission has already held in MSHA v. Wolk Creek Collieries Co., 79-3-11, and in Pontiki Coal Corp. v. MSHA, 79-10-13, that the validity of notices and orders issued under the 1969 Act are not at issue in civil-penalty proceedings. Nevertheless, since Respondent's contentions are based essentially on arguments pertaining to the criteria of negligence and gravity, which must be considered in civil-penalty proceedings, I shall discuss its arguments with respect to those two criteria.

Respondent argues in its brief (pp. 8-9) that the violation was not serious because Respondent's electricians were making methane tests every 15 minutes and that the Chaney Creek No. 2 Mine does not have a history of emitting enough methane to make the likelihood of an explosion more than a mere possibility. As MSHA notes in its brief (p. 9), it is necessary to consider the potential danger associated with a given violation because the purpose of the regulations is to require that miners be protected from possible explosions as well as those which are indisputably likely to occur. An inspector does not have to find the existence of an imminent danger in order to conclude that the use of a nonpermissible drill inby the last open crosscut is a potentially dangerous violation (Tr. 483; 486).

Respondent's brief (p. 8) also argues that there was a very low degree of negligence, if any, associated with the violation. The testimony shows that Respondent's electricians were grossly negligent in using the nonpermissible drill inby the last open crosscut. While it is true that the chief electrician said that he was unaware that the continuous-mining machine was inby the last open crosscut and that he would not have used the nonpermissible drill if he had known that the continuous-mining machine was inby the last open crosscut (Tr. 514-515), the fact remains that the chief electrician knew that the drill was nonpermissible. He either knew or was obligated to know whether the machine was inby the last open crosscut. The chief electrician had been working in coal mines for over 30 years and can hardly be found to have been nonnegligent in failing to realize that he was using a nonpermissible drill inby the last open crosscut.

The chief electrician's use of the nonpermissible drill was also associated with his having removed the cover on the control compartment of the continuous-mining machine for the purpose of obtaining electrical current to power the nonpermissible drill (Tr. 514; 517). He stated that he was making checks for methane every 15 minutes for the reason that he had removed the panel cover rather than for the reason that he was using a nonpermissible drill (Tr. 514). Respondent's safety director was hard pressed to support the chief electrician's removal of the panel cover. The most the safety director could say in justification of the opening of the control compartment was that such acts are permitted if the purpose of opening the compartment is to determine the reason for a malfunction of the continuous-mining machine. There was no need to open the control compartment for the purpose of trouble shooting because the electricians working on the mining machine knew what was wrong with the machine, namely, that sheared bolts in the tracks prevented the machine from being trammed from one location to another (Tr. 499-500).

MSHA's brief (p. 3) argues that the inspector's testimony to the effect that a trailing cable was being used to power the hand-held drill is more credible than that of the electrician's testimony to the effect that the drill was being powered from an outlet located in the control compartment beneath the panel cover which had been removed. I have found the chief electrician's testimony to be more credible than the inspector's for several reasons. First, in stating that he had removed the cover to the control compartment (Tr. 514), the chief electrician was admitting that he had done an unsafe act. It is unlikely that he would have fabricated a statement that made him look even more negligent than he would otherwise have appeared. Second, the electricians were very anxious to restore the continuous-mining machine to an operating condition. Use of power from the mining machine would have been an easy way to obtain power for the drill without the electricians' having to find a trailing cable and connect it to the main power source in the mine. Third, at the time the inspector left the scene of the violation, the drill was still hooked to a power source, but the drill had been removed from the vicinity of the mining machine by the time the inspector returned (Tr. 488). The inspector, therefore, was not present when the drill was disconnected from its power source. The chief electrician was certainly in a position to know what the drill's source of power really was. Therefore, I find that the source of the drill's power was the control compartment on the continuous-mining machine. Of course, the removal of the cover from the control compartment increased the number of potential arcing electrical components which could have caused a fire or explosion if a dangerous accumulation of methane had occurred.

MSHA's recommendation that a penalty of $10,000 be assessed for this violation of section 75.501-2(2) fails to recognize many of the extenuating circumstances surrounding the violation. First, the continuous-mining machine weighed 40 tons and the inspector incorrectly stated that a shuttle car could have been used to pull the machine a distance of 25 to 30 feet so as to permit the work to be done outby the last open crosscut (Tr. 492; 505-506). Second, the operator did not have the kind of hoist which would have been required to move the machine to a point outby the last open crosscut. Third, a period of about 3 days, or nine shifts, would have been required to bring in another continuous-mining machine having sufficient power to pull the inoperable machine to a point outby the last open crosscut. Third, the inspector removed himself physically from the site of the repair operations with the result that the electricians had time during the inspector's absence within which to continue using the nonpermissible drill for the purpose of completing the removal of the headless bolts (Tr. 509-510; 516). Fourth, if the inspector considered the use of the nonpermissible drill to be a very serious violation, he should have required that the drill be immediately removed from the site of the continuous-mining machine instead of merely advising the electricians that he would not issue a notice of violation at that time and would return later for that purpose (Tr. 509-510). Fifth, the electricians were making a methane test every 15 minutes and the drill would have been deenergized by the continuous-mining machine's methane monitor if the concentration of methane in the atmosphere had reached as much as 2 percent. MSHA's brief (p. 6) argues that the methane tests required by section 75.1106 must continously be made by means of a hand-held methane detector and that a methane monitor cannot be substituted for a hand-held device. That may be true if we were determining whether a violation of section 75.1106 had occurred, but we are not here confronted with an actual violation of section 75.1106, and MSHA introduced no evidence to controvert the chief electrician's statement that the methane monitor on the continuous-mining machine was working. Therefore, the monitior would have deenergized the drill if methane in a concentration of 2 percent had occurred. For the foregoing reasons, I find that the violation was not of such a serious nature as to warrant assessment of a maximum penalty of $10,000.

MSHA's brief (p. 8) does correctly argue that Respondent's deliberate use of the nonpermissible drill was equivalent to gross negligence. Consequently, in assessing a penalty, most of the weight in determining the penalty must be assigned under the criterion of negligence and the criterion of the size of Respondent's business. Respondent has not previously been cited for a violation of section 75.501-2(2) (Tr. 477). Therefore, it is unnecessary to consider the criterion of Respondent's history of previous violations. There was a good faith effort to achieve rapid compliance (Tr. 488). Since Respondent operates a very large coal business and inasmuch as its electricians were grossly negligent in using a nonpermissible drill inby the last open crosscut, a penalty of $2,000 will hereinafter be assessed for this violation of section 75.501-2(2).

Docket No. NORT 78-369-P (Open Fork No. 2 Mine)

Notice No. 2 KFO (7-115) October 18, 1977 section 75.400 (Exhibit M-31)

Findings. Section 75.400 provides that coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings. Respondent violated section 75.400 because loose coal had been permitted to accumulate in active workings for a depth of 2 to 4 inches in the No. 3 entry for a distance of 175 feet inby the loading point and for a depth of from 2 to 24 inches in an adjacent crosscut for an additional distance of 60 feet, or for a total distance of 235 feet (Tr. 526-527). The deepest coal accumulation in the crosscut had fallen from the feeder prior to the time that the belt line had been moved (Tr. 528; 568). The loose coal accumulations in the No. 3 entry resulted from overfilling of the shuttle cars so that the coal was dragged off the top of the shuttle cars as they passed through the entry on their way to the dumping point (Tr. 562; 570). The violation was moderately serious because the only ignition sources in the vicinity of the accumulations were the trailing cables and electrical components of the shuttle cars. The danger of a fire or explosion was reduced because no methane was detected and the inspector observed no defects in the shuttle cars' trailing cables (Tr. 547-548). While the inspector found a permissibility violation in one of the shuttle cars, he did not know if that particular shuttle car had passed through the loose coal accumulations (Tr. 548). Respondent was grossly negligent in permitting the accumulations to exist because Respondent's employees had to stand in the deepest of the accumulations at the time they moved the conveyor belt and the accumulations should have been cleaned up at that time (Tr. 532).

Discussion and Conclusions. Respondent failed to file a posthearing brief with respect to the issues raised by MSHA's Petition for Assessment of Civil Penalty filed in Docket No. NORT 78-369-P. MSHA's brief is primarily devoted to demonstrating that MSHA's presentation in Docket No. NORT 78-369-P was sufficient to satisfy the evidentiary steps for proving the existence of a violation of section 75.400 as those steps were established by the former Board of Mine Operations Appeals in Old Ben Coal Co., 8 IBMA 98 (1977). While it appears that MSHA did prove that a violation occurred even if the requirements of the Board's Old Ben case were still in effect, the Commission held in MSHA v. Old Ben Coal Co., 79-12-4, that MSHA does not have to satisfy the criteria established by the Board in its Old Ben opinion. The Commission held in its Old Ben decision that the mere existence of combustible materials is sufficient to show that a violation of section 75.400 has occurred.

Respondent's section foreman agreed that the inspector had correctly described some loose coal accumulations which existed in the No. 3 entry and adjacent crosscut (Tr. 564). Respondent's section foreman agreed that the accumulations had been caused by loose coal accumulating at the belt feeder before it was moved and by loose coal having been dragged off shuttle cars on which coal had been piled too high to pass under the low roof which existed inby the loading point (Tr. 569-570). The section foreman stated that he had observed the loose coal accumulations before the inspector arrived on the section and that he would have had them cleaned up by the continuous-mining machine when it completed cutting through the pillar from which it was extracting coal at the time the inspector arrived to examine conditions in the section (Tr. 564). The section foreman said that he would have had the loose coal cleaned up within a period of from 30 minutes to an hour (Tr. 566). The section foreman said that he did not stop the continuous-mining machine and clean up the loose coal immediately after he observed the loose coal accumulations because they were engaged in retreat mining and he believed that interrupting the cutting process in a given pillar of coal during retreat mining subjected the miners to greater danger than allowing the loose coal accumulations to exist for a period of from 1 to 2 hours (Tr. 566-567).

Since Respondent's section foreman testified after the inspector had finished his testimony, there is nothing in the record to controvert the validity of the reason given by the section foreman for not having cleaned up the loose coal prior to the time that it was observed by the section foreman. On the other hand, it would appear that the section foreman could have examined his section for the existence of loose coal accumulations prior to commencement of mining operations. If he had done so, it appears that he could have used the mining machine to clean up the loose coal prior to initiation of cutting operations in a pillar of coal. The section foreman who testified at the hearing was the one who was present at the time the inspector's notice of violation was written. That section foreman had been on leave for the 2 days preceding the writing of the notice and it was during his absence from the mine that the belt conveyor had been moved. He was, therefore, not present at the time the loose coal accumulations were left after the belt was moved. He was, nevertheless, grossly negligent in failing to clean up the loose coal accumulations prior to the commencement of mining operations. The section foreman should have been notified by entries in the preshift book that the loose coal accumulations existed. If the preshift book did not record the existence of the accumulations, then Respondent's section foreman and preshift examiner on the previous shifts were grossly negligent for either not having cleaned up the accumulations or for not having made an entry about the accumulations in the preshift book.

MSHA's brief (p. 10) recommends that a penalty of $2,000 be assessed for this violation of section 75.400. That appears to be a reasonable penalty when all of the criteria are considered. Although there were potential ignition hazards in the form of trailing cables to the shuttle cars, the actual danger of an explosion or fire was somewhat remote (Tr. 554). The inspector did not detect any trace of methane in the mine at the time he wrote the notice of violation (Tr. 547). The most methane the inspector had ever detected in the mine on any prior inspections was .2 of 1 percent and a bottle sample taken by the inspector revealed only .05 of 1 percent of methane (Tr. 547; 549). Consequently, the inspector himself said that an explosion was not likely to result from existence of the accumulations (Tr. 554).

As I have indicated above, the primary criterion which requires the assessment of a rather large penalty in this instance is that Respondent's supervisory personnel had known of the existence of the loose coal accumulations for a considerable time and had failed to clean them up. Considering that a large operator is involved, that there was a good faith effort to achieve rapid compliance (Tr. 545), that the violation was moderately serious, and that Respondent was grossly negligent, a penalty of $1,500 should be assessed. Exhibit M-30 shows that Respondent has paid penalties for 52 prior violations of section 75.400 in its Open Fork No. 2 Mine. Two of the violations occurred in 1971, 12 in 1972, 5 in 1973, 9 in 1974, 3 in 1975, 9 in 1976, and 12 in 1977. I find that the foreging statistics indicate that Respondent's Open Fork No. 2 Mine has a very unfavorable trend in its history of previous violations. The history is especially adverse in that Respondent had violated section 75.400 on 12 occasions during the 9-1/2 months of 1977 preceding the writing of the instant violation on October 17, 1977. In such circumstances, the penalty of $1,500 should be increased by $500 to $2,000 under the criterion of history of previous violations.

Summary of Assessments and Conclusions of Law

(1) The motions for approval of settlement made with respect to MSHA's Petitions for Assessment of Civil Penalty filed in Docket Nos. NORT 78-366-P and NORT 78-368-P should be granted and the settlements should be approved for the reasons given in the firt part of this decision.

(2) Pursuant to the settlement agreements, Respondent should be ordered to pay civil penalties totaling $5,750.00 which are allocated to the respective alleged violations as follows:

Docket No. NORT 78-366-P

Order No. 1 CAG (7-46) 9/6/77 § 75.400	$ 2,000.00
Order No. 2 CAG (7-47) 9/19/77 § 75.301-4	2,500.00
Total Settlement Penalties in Docket No. NORT 78-366-P	$ 4,500.00

Docket No. NORT 78-368-P

Notice No. 1 VH (7-28) 8/1/77 § 75.200	$ 1,250.00
Total Settlement Penalties in Docket No. NORT 78-368-P	$ 1,250.00
Total Settlement Penalties in This Proceeding	$ 5,750.00

(3) On the basis of all the evidence of record and the foregoing findings of fact, Respondent should be assessed the following civil penalties:

Docket No. NORT 78-325-P

Notice No. 1 WJT (6-85) 12/21/76 § 75.1403-10	$ 9,000.00
Total Civil Penalties in Docket No. NORT 78-325-P	$ 9,000.00

Docket No. NORT 78-365-P

Order No. 2 CAG (7-15) 1/31/77 § 75.400	$ 8,000.00
Total Civil Penalties in Docket No. NORT 78-365-P	$ 8,000.00

Docket No. NORT 78-367-P

Notice No. 1 KCK (7-95) 11/17/77 § 75.501-2(2)	$ 2,000.00
Total Civil Penalties in Docket No. NORT 78-367-P	$ 2,000.00

Docket No. NORT 78-369-P

Notice No. 2 KFO (7-115) 10/18/77 § 75.400	$ 2,000.00
Total Civil Penalties in Docket No. NORT 78-369-P	$ 2,000.00
Total Civil Penalties in Contested Cases in This Proceeding	$21,000.00

(4) MSHA's Petition for Assessment of Civil Penalty filed in Docket No. NORT 78-364-P should be dismissed for failure to prove that the violation of section 75.317 alleged in Notice No. 1 CAG (7-38) dated June 21, 1977, occurred.

(5) Respondent, as the operator of the coal mines listed in the caption of this decision, is subject to the provisions of the Act and to the regulations promulgated thereunder.

WHEREFORE, it is ordered:

(A) The motions for approval of settlement described in paragraph (1) above are granted and the settlement agreements are approved.

(B) Respondent, within 30 days from the date of this decision, shall pay civil penalties totaling $26,750.00 of which $5,750.00 are assessed pursuant to the parties' settlement agreements described in paragraph (2) above and $21,000.00 are assessed pursuant to my decision on the contested issues as summarized in paragraph (3) above.

(C) MSHA's Petition for Assessment of Civil Penalty filed in Docket No. NORT 78-364-P is dismissed for the reason given in paragraph (4) above.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 15 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
Petitioner
: Docket No. WEVA 79-304
v. AC No. 46-01417-03014V
: No. 14, No. 3 Seam Portal
UNITED STATES STEEL CORP.,
GARY DISTRICT, :
Respondent

DECISION GRANTING MOTION TO DISMISS

On November 22, 1978, Petitioner issued Order No. 253998 to Respondent, under section 104(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. section 801 et seq., citing a violation of 30 CFR 75.200, a mandatory safety standard. Respondent filed an application for review of the order. A hearing on the merits was held and on September 19, 1979, a decision was issued by Judge Stewart in United States Steel Corporation, Docket No. HOPE 79-152 (September 19, 1979). In vacating the order of withdrawal, he found that "Applicant did not violate its roof control plan or section 75.200 as alleged in Order No. 253998."

On September 4, 1979, Petitioner filed a petition for assessment of civil penalties for the roof control violation as alleged in Order No. 253998. Respondent filed an answer denying the violation and moved to dismiss the petition based on the decision of Judge Stewart in HOPE 79-152.

I find that Judge Stewart's decision in HOPE 79-152 is res adjudicata as to the issue of a violation in this proceeding.

WHEREFORE IT IS ORDERED that the Respondent's motion to dismiss is GRANTED and the petition for assessment of civil penalties is DISMISSED.

William Fauver
WILLIAM FAUVER, JUDGE

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 15 1980

SECRETARY OF LABOR, Petitioner	:	Civil Penalty Proceeding
v.	:	Docket No. PENN 79-36-M AC No. 36-00238-05008F
MARBLEHEAD LIME COMPANY Respondent	: :	Pleasant Gap Mill

DECISION AND ORDER APPROVING SETTLEMENT

On December 26, 1979, the Solicitor filed a motion for decision and order approving settlement of this case. This case involves one charge of violation of safety and health standards initially assessed by MSHA for $7000.00. The parties requested approval of a settlement as follows:

Citation No. 303938 alleged a violation of 30 CFR 57.14-20 (failure to block machinery against motion while performing repairs or maintenance). The parties moved for approval of a settlement in the amount of $3600.00 whereas the initial assessment was for $7000.00. In support of the motion it is stated that "The operator's negligence was over assessed." Although this citation resulted from a fatal accident where a repairman mechanic was crushed against a work bench by a front end loader, the operator "believed that motion was necessary to make adjustments during the installation of axles" and "This procedure was also used at the repair facilities of several other area companies."

Having duly considered the matter, I conclude that the recommended settlement is consistent with the purposes and policy of the Act. The recommended settlement is, therefore, approved.

Accordingly, it is ORDERED that the motion for decision and order approving settlement is GRANTED. It is FURTHER ORDERED that the operator pay $3600.00 and that subject to such payment the petition be DISMISSED.

James A. Laurenson
James A. Laurenson, Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 22 1980

CONSOLIDATION COAL COMPANY, Applicant	:	Application for Review
v.	:	Docket No. MORG 79-109
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 814153 Dated: February 26, 1979 Four States No. 20 Mine
UNITED MINE WORKERS OF AMERCIA (UMWA), Respondent	:	

DECISION

Appearances: Karl T. Skrypak, Esq., Pittsburgh, Pennsylvania, for the applicant;
Leo J. McGinn, Trial Attorney, U.S. Department of Labor, Arlington, Virginia, for respondent MSHA;
Joyce A. Hanula, Legal Assistant, Washington, D.C., for respondent UMWA.

Before: Judge Koutras

Statement of the Proceeding

This is an action filed by the applicant on March 8, 1979, pursuant to section 107(a)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 817(e)(1), seeking review of an imminent danger closure order issued by MSHA inspectors Raymond L. Ash and Frank D. Bowers on February 26, 1979, pursuant to section 107(a) of the Act. Withdrawal Order No. 814153, described the following condition or practice which the inspectors believed constituted an imminent danger warranting closure of the entire mine and the withdrawal of miners:

> An order of withdrawal is issued to withdraw all miners from the inside of the Consol No. 20 mine and miners on the surface at the Four States Preparation Plant to insure their safety due to the danger of the fresh water dam giving way. The fresh water dam is used for the Four States Community

> water. Water is being discharged from the dam with 2 Ford tractors, discharging into (2) 10" inch lines, approximately 1000 gallons per minute, approximately half-way over the embankment and the water pressure from these 10" lines are eating away at the embankment and toe of the dam to a depth of approximately 6 to 7 feet. This order is issued through no fault of the company. Also, other signs of instability exists along the face and toe of this, such as piping and etc.

In its review petition, applicant asserted that the order was improperly and unlawfully issued because:

1. The description of the conditions and practices in the order is inaccurate, no violation of section 3(j) of the 1977 Act occurred as alleged, and that there did not exist in the Four States No. 20 Mine at the time in question any conditions or practices constituting an "imminent danger" within the meaning of section 107(a) of the Act.

2. The order is invalid since the Mine Safety and Health Administration (MSHA) did not have the authority, capacity, power or right to act in the subject situation. MSHA lacked jurisdiction in the matter since the dam was not owned, operated or controlled by the applicant, and it was not used in, to be used in or resulting from the coal mining operations at the Four States No. 20 Mine. An engineering study relating the volume of water in the dam to the elevation of the mine shaft indicates that it would have been physically impossible (in the event of a dam failure) for the resulting water flow to reach the site of the mine shaft.

3. The order falsely implies that the breastwork of the dam was purely earthen when same was in fact concrete and steel at the face banked with earth and covered with trees and vegetation. Therefore, "no danger" existed and the likelihood of the dam breaking was certainly not "imminent."

Respondents filed timely answers to the review petition and asserted that the imminent danger order was properly issued and should be affirmed. A hearing was held in Morgantown, West Virginia, on July 31 and August 1, 1979, and the parties appeared and participated fully therein. Posthearing proposed findings, conclusions, and supporting briefs have been filed by all parties and the arguments presented have been carefully and fully considered by me in this course of this decision.

Applicable Statutory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*

2. Section 107(a) of the Act provides:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized

> representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

3. Section 3(j) of the Act (30 U.S.C. § 802(j)) provides that the term "imminent danger" means: "[T]he existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated; * * *."

Issues

1. Whether the conditions cited and described by the inspectors presented an imminent danger warranting the issuance of a closure order pursuant to section 107 of the Act.

2. Whether MSHA exceeded its jurisdiction by issuing an imminent danger closure order and requiring the withdrawal of miners based on an asserted imminent danger which purportedly did not exist in the mine or on mine property.

3. Additional issues raised by the parties are identified and discussed in the course of this decision.

Background of the Controversy

Aside from the question of jurisdiction and whether an imminent danger did in fact exist, the essential facts surrounding the issuance of the imminent danger order in question do not appear to be in dispute. The events leading up to the issuance of the order began on the evening of February 26, 1979, when MSHA's subdistrict office received a telephone call through MSHA's chain of command concerning a "hotline" telephone call received by MSHA's Arlington, Virginia, headquarters reporting that someone was discharging water from a dam in the municipality of Four States, West Virginia. The dam in question is known as the Four States Dam, and it is owned and operated by the Four States Public Service District and is used as a water supply for the residents of the community of Four States. The dam is not owned or controlled by the applicant and it is not located on mine property. It was originally constructed in the early 1900's and is located in a remote rural area, approximately 1,600 feet from the mine property beginning at a parking lot, and approximately one-half mile northeast of the town of

Four States on an unnamed tributary of Tevebaugh Creek of the West Fork River of the Monongahela River. The physical characteristics and type of construction for the dam are detailed in a study compiled in February 1979, by the West Virginia Department of Natural Resources under guidelines provided by the United States Corps of Engineers pursuant to the National Dam Inspection Act, P.L. 92-367, August 2, 1972. A copy of the study is a part of the record and was supplied to all of the parties and to me for the purpose of familiarizing the parties with the physical characteristics and problems concerning the dam as perceived by those entities who compiled the report and for the purpose of posthearing arguments (Tr. 259-260). Since the report was mentioned and referred to on several occasions during the course of the hearing, it was received by me over objections by applicant's counsel as to its probative value.

In general, the dam in question is approximately 29 feet high and 255 feet wide, and it consists of an arched concrete, brick, and concrete block cantilever retaining wall with an earthen embankment consisting of trees, soil, and extensive and dense vegetation and brush. The embankment was described as a slope varying from 25 to 35 degrees to the downstream side, and the surface water area was described as encompassing some 3.7 acres and extending some 800 feet. At normal height, the volume of water impounded by the structure was described as approximately 45-acre feet, although the actual volume of water retained by the dam has apparently never been precisely computed. In addition to the Corps of Engineers study, the record compiled in this proceeding includes maps, surveys, descriptions, sketches and pictorial slides which detail the physical exterior and engineering construction specifications for the dam. In addition, for the purpose of familiarizing me and the parties with the general topography and geography of the dam and surrounding terrain, including its proximity to the mine which is located downstream, a visit was made to the dam site and the mine at the conclusion of the hearing and those in attendance included counsel for all parties as well as MSHA's inspectors and others who testified at the hearing.

Upon arriving at the dam site at approximately 7:30 p.m., on February 26, 1979, a dark, cold, and snowy evening, MSHA inspectors Ash and Bowers observed two tractors parked at the side of the dam pumphouse. The tractors were supplying power to two pumps which were pumping water from the dam through two 10-inch lines. One line was extended part way down the earthen side of the dam structure, and the second line was located below the first one, and both lines were discharging water from the dam down the earthern embankment. No one was tending the pumps and no one was in the area. The inspectors observed and believed that the water being pumped from the dam resulted in the washing away of a large gulley or culvert, and the depth of the this wash-out was approximately in excess of some 5 feet. After this initial observation, the inspectors traversed across the dam and observed what was described as fresh water coming out of the ground in several locations on the earthern side of the structure, and moving water which was swirling about in different directions at the bottom or toe of the earthern side of the dam. They believed that these conditions had resulted from water seepage from the inside or water impoundment side of the dam through the concrete structure. They estimated the water level in the dam at that time as approximately 2 or 3 feet below the top of the dam. They then proceeded back to the gulley area created by the pumping water and at that time estimated it to be some 7 to 8 feet in depth and much longer than initially observed. At that point in time, they decided that the continuing erosion of the portion of the earthern structure where the water was being pumped created a potential for collapse of the dam, thereby creating an imminent danger to the miners working at the mine located downstream at the mouth of a hollow extending from the dam to the mine property. The inspectors then drove to the mine and advised the mine superintendent by telephone that a section 107(a) closure order would be issued until such time as the pumping of the water from the dam was stopped or the lines extended at the face of the dam, and the written order was issued at 8:30 p.m. A prior incident involving the dam occurred in December 1978, when state and local authorities, concerned about the possible collapse of the dam after a heavy rainfall, ordered the evacuation of the inhabitants downstream, including miners from the Four States No. 20 Mine.

After the closure order was issued and the miners withdrawn, the inspectors returned to the dam to await the arrival of an MSHA engineer. The only person in the area at this time was a civil defense representative who was apparently in charge of the pumping of the water from the dam, and it was later determined that the pumping was done at the recommendation of the Corps of Engineers in order to prevent the water from reaching the spillway level of the dam. Upon arrival of the engineer, he and the inspectors again inspected the dam, and the engineer concurred in the inspectors' assessment that the pumping of the water from the dam onto the earthern face of the structure had caused the erosion creating the gulley, and coupled with leakage from the structure, could lead to a collapse of the dam if the pumping were to continue unabated.

After the cessation of the pumping of the water, the order of withdrawal was terminated at 11:45 a.m., on February 27, 1979, and the termination order states as follows: "Pumping of water on the earthern breastwork of the Four States water dam has been discontinued, therefore, there is no longer erosion of the breastwork and it is now in a more stable condition."

Following the termination of the order, MSHA engineers engaged in a study to determine in future incidents, what the precise effects would be downstream should the dam fail. Based on this study, it was determined that in the event of a partial or full collapse of the dam structure, a wall of water ranging from 5 to 8 feet in depth would reach parts of the mine property, including the railroad yards and some of the surface area of the preparation plant, but not the mine shafts or the preparation plant building itself.

Testimony and Evidence Adduced by MSHA

MSHA inspector Raymond Ash, testified that on February 26, 1979, he received a telephone call from the MSHA office in Arlington about a water problem at the Four States Fresh Water Reservoir and in response to the call, he and fellow inspector Frank Bowers went to the dam and arrived at 7:30 p.m. Mr. Ash observed two tractor pumps discharging water through two 10-inch rubber lines in an uncontrolled manner on the earthern part of the dam. The first rubber line, located near the toe of the dam, was washing away the earthen breastwork of the dam. The second rubber line, located over the embankment, was not causing any damage to the dam (Tr. 19-23). When he walked along the dam embankment, he found the ground icy, slushy, and spongy, and when he inserted a 3-foot long tree limb and a five-eighths-inch steel bolt rod into the embankment, they disappeared. He found muddy cavities in the breastwork of the dam, including gully erosion. The gully was about 8 feet deep and 60 feet long, and the water was about 3 feet below the top of the dam and the spillway was not being used. When he walked to the other side of the dam, he saw more cavities in the earth breastwork, and water was bubbling in the center of the earth breastwork as well as out of the ground against the stone face of the dam. The water was traveling down the hill, and the presence of running water, including the gully erosion, frightened him. The presence of running water coming through the earth breastwork, led him to believe that the pumping had caused the stone wall of the dam to fail, and a trench created by the pumping provided a place for the whole side of the earth dam to slide. Water, clay and stones were swirling at the toe of the dam. After making all of these observations, it was his judgment that the stability of the dam was so bad that there was a real danger of the dam "coming out." He discussed the situation with Mr. Bowers, and while they concluded that MSHA did not have jurisdiction over the dam, they believed that something had to be done and they wanted someone at the mine to help take care of the problem (Tr. 23-31).

Mr. Ash testified that the mine property was 500 to 600 feet below the dam and while traveling to the mine he saw 6 inches of muddy water running over the road, and he believed that the muddy water came from the dam. Upon arriving at the mine he talked to superintendent Eugene Jordan by telephone about the situation, and Mr. Jordan advised him that the company had nothing to do with the dam. After attempting to issue a verbal withdrawal order at 8:15 p.m., which Mr. Jordan would not accept, it was issued in writing and served on the company at 8:30 p.m. At that time he also telephoned the assistant district manager, the state police, and the U.S. Army Corp of Engineers about the dam conditions (Tr. 34). After the withdrawal order was served, he and Mr. Bowers went back to the dam to wait for Frank R. Watkins, MSHA's water impoundment engineer.

Mr. Ash defined an imminent danger as "it is a condition or practice that if it is allowed to continue and the operation goes on as normal, and this condition or practice is allowed to continue, someone will get seriously hurt or killed" (Tr. 36). The dam is 300 feet wide, 1,000 feet long, with a face of some 30 feet, and it had a prior water overflow problem. The uncontrolled pumping and wash-out led Mr. Ash to believe that if he had not issued the withdrawal order the continued pumping would have caused the right side of the portion of the dam upstream to erode that it would have lost its earth face and stone wall at the same time. Fifty to 60 miners, as well as the recreational hall downstream could be in danger from flooding (Tr. 36-42).

On cross-examination, Mr. Ash testified that his training in water impoundments consists of a 5-day MSHA training program dealing with the recognition of dangerous conditions rather than water volume calculations and structure analysis and he has no such training (Tr. 42-43). On the evening in question it was dark and the only lighting available was his cap lamp (Tr. 44). If the dam had broken, the water may have reached mine property, and at the time the order issued he thought it would reach the portal (Tr. 54). When he arrived at the mine, he did talk to certain mine supervisors about the condition of the dam, but he did not inspect the mine completely to determine the extent of the imminent danger, nor did he remain to insure that all miners were in fact withdrawn and this was because he is not required to. He denied that he had given his consent to anyone to remain in the mine (Tr. 54).

On redirect, Mr. Ash reiterated that he observed a steady stream of water at the top of the earthen portion of the dam and it was starting to flow down the face of the bank with enough force to carry sediment away very quickly. It was his opinion that the water resulted from a break somewhere in the stone-faced dam because the water flow was more than mere seepage. When asked why he believed the water from the dam would reach the mine in the event of a collapse, he answered as follows (Tr. 59-60):

> Q. When you related about the collapse of the dam to the danger on mine property, did you have any basis for a judgment as to whether or not there was enough capacity here to affect or involve the mine property?
>
> A. I actually thought there was enough water that it would go down both shafts there. It would probably knock the power off at the Four States and go down at least two shafts, the coal shaft and the shaft that the men who worked near that bottom came down.
>
> Q. What was the basis for this judgment?
>
> A. I have seen water. I have seen water running in shafts before.
>
> Q. But from this dam related to the mine, what made you think that this dam was large enough in capacity to possibly have this happen?
>
> A. I had no firm basis for my opinion, nothing; engineering, no firm basis, or anything. To me, the dam was large enough. There was a large volume of water, and I couldn't see how it could go down that hollow without getting into that shaft.

> Later on, it is easy to look at it and think but then, it is a snowy night; it is cold, and the wind is blowing. There was rain; there was water; there was mud all over the face of that dam. To me, we did the proper thing.

Mr. Ash further stated that he could not determine how the tractors got to the dam site, nor could he find out who was operating them. His attempts to ascertain these facts by telephone were fruitless since no one wanted anything to do with the dam. He believed that when he issued his order there was a definite potential danger of risk to the miners in the mine (Tr. 61).

In response to questions from the bench, Mr. Ash explained the basis on which he issued his imminent danger order as follows (Tr. 68-70):

> JUDGE KOUTRAS: Assuming that that dam had been two and one-half to three feet below the level of the crest, and assuming that they had no pumps there, would you have done anything that night? There wouldn't have been any cause for anybody to go there, would there?
>
> THE WITNESS: No, there wouldn't have.
>
> JUDGE KOUTRAS: Your concern was the manner in which this water was being pumped out of this dam that was causing some erosion?
>
> THE WITNESS: Yes, sir.
>
> JUDGE KOUTRAS: So am I to assume then that the principal cause of the apparent imminent danger, or what you thought was imminent danger, was caused by the manner in which this water was being pumped out of the dam?
>
> JUDGE KOUTRAS: So the rushing water that you were concerned about was the water that was being pumped out of the dam with these ten-inch lines?
>
> THE WITNESS: Yes, sir.
>
> JUDGE KOUTRAS: Which was causing a little erosion here?
>
> THE WITNESS: In my opinion, it was more than a little.
>
> JUDGE KOUTRAS: It was causing a gully of water to rush down?
>
> THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Theoretically if they pumped all of the water out of the dam, it would inundate the mine at some point in time, wouldn't it?

THE WITNESS: No, because it would come out gradual.

JUDGE KOUTRAS: The reason that you decided to withdraw the miners was because that you thought this pumping of the water was done in such a manner that eventually --

THE WITNESS: This pumping was done in such a manner that this gully, the erosion gully, would come down here and give this bank, which is nothing but mud, spongey mud, a place to slide and let the whole dam go.

JUDGE KOUTRAS: If that spongey mud slid, what would happen to the stone wall and the cement behind it and all of that? Would that come down, too, in your mind?

THE WITNESS: Yes, it would have.

And, in response to questions by Applicant's attorney (Tr. 77):

Q. Mr. Ash, isn't it true that if the people who were pumping this dam had extended those hoses below the dam, they could have pumped out the entire volume of water in that dam, and it would not have bothered that mine whatsoever; isn't that true?

A. Yes, sir.

Q. The real imminent danger that you were fearful of is the actual bursting of that dam and the wall of water coming down that valley; is that correct?

A. Yes, sir.

MSHA Inspector Frank D. Bowers testified that he has been a coal mine inspector for approximately 9 years but that his experience and training on dams and impoundments was the same as that of Mr. Ash. He accompanied Mr. Ash on the evening of February 26, during the inspection of the dam, and after listening to his testimony he indicated substantial agreement with it. The discharging of the water over the dam and onto the earthern embankment by pumping was eating away at the embankment, and this in turn would weaken the stone or brick dam wall behind the embankment. He has seen training films which depicted water seeping through an embankment from a crack, and he indicated that once started it will eventually eat away the dirt and then give way. Aside from the gulley of water, the other water they observed was from seepage through the dam. Since he had no authority to order the pumps shut down and could do nothing about the dam, his only recourse was to "pull the men out of the mine for their safety." He believed an imminent danger existed and he defined "imminent danger" as "an event which could be reasonably expected to cause serious harm or death before such condition or practice can be abated" (Tr. 82-85).

On cross-examination, Mr. Bowers reiterated that his dam and impoundment training consisted of a 1-week training class which consisted primarily of viewing slides, films, and classwork. In the event he observes an impoundment condition which does not appear normal or is not an imminent danger, his practice is to call on Mr. Watkins for assistance. Mr. Bowers agreed that he had no jurisdiction over the dam itself. He believed the mine property was approximately 500 to 600 feet down the hollow from the dam, but also agreed that the distance could be 1,600 feet (Tr. 87). There was vegetation on the earthern breastwork structure of the dam and some of it was as high as 20 feet. He had not previously inspected the dam and has not inspected it since the order was issued (Tr. 88). With regard to the existence of an imminent danger outside of mine property, Mr. Bowers testified as follows (Tr. 89-90):

> Q. Is it your opinion that an imminent danger condition can exist outside of mine property?
>
> A. At this particular time, yes.
>
> Q. And you would agree that this condition was outside of the mine property?
>
> A. Yes.
>
> MR. SKRYPAK: I have nothing further.
>
> BY MR. McGINN:
>
> Q. Mr. Bowers, what area was closed as being in imminent danger under the order?
>
> A. The entire mine, the inside and outside surface facility.
>
> Q. So the imminent danger consisted of the area of the mine?
>
> A. Yes.
>
> Q. When you say that the imminent danger was outside, did you mean --
>
> A. As far as the dam giving way, which was not, as far as we knew, on mine property.

Q. So the cause of the imminent danger, is that correct?

A. Yes.

Q. Was upstream?

A. Right.

Q. But the closure order was issued --

A. It was on the mine property itself.

Q. That is where the danger existed; is that correct?

A. That is right.

JUDGE KOUTRAS: That is a play on words, too. It is clear to me that both inspectors believed that the cause of the imminent danger was something that was off mine property, but they were concerned that if they did not withdraw those miners, the imminent danger would get on mine property; the water would get down. Isn't that what their testimony is?

MR. McGINN: Yes. I have nothing further.

In response to questions from the bench, Inspector Bowers testified that the water from the dam was coming down the hollow, and while it did not reach mine property at that time, it did reach the roadway paralleling the hollow. His concern was that the pumping of the water over the earthen breast of the dam would eventually weaken the dam wall, and while he did not know how long this process would take, he stated, "By all indications, it looked to me like it wouldn't take long" (Tr. 93). Mr. Bowers also stated that Consolidation Coal was not in violation of any regulations, and that while he had no jurisdiction to check out the dam, the only thing he had to work with was section 107(a). As far as he knows, no MSHA inspector has been back to the dam to inspect it again. Assuming there were another rainfall, he would not go back to inspect the dam unless he were asked to because he has no authority over the structure.

MSHA supervisory engineer Frank R. Watkins, testified that he is in charge of waste banks and impoundments and that he previously worked for the Federal Power Commission, Bureau of Power. His prior experience includes the writing of engineering reports along with Commission license orders for hydraulic and power generation dams on navigable waterways operated by private parties. He also conducts engineering studies on the construction and maintenance of water impoundments, refuse piles, shaft construction, and ground control for strip mines (Tr. 98). He visited the dam site in question after receiving a telephone call from Merle Manus, MSHA Assistant District Manager, and after arriving at the Four States Water Reservoir at 9:30 p.m., he spoke with the MSHA inspectors, a safety committeeman, the dam pump operator, and a Civil Defense representative. He walked across the dam to the spillway, and observed that water was not going through the spillway. There was 2-1/2 to 3 feet of freeboard between the top of the dam and the water level. There were two areas that were leaking through the dam structure. The first leak was located in the middle which was free-moving, and the second leak was located to the right which was a slow leak. In addition to water, he observed an 8-foot gully near the water pumps. After observing the 8-foot gully, he observed an "old hole" which appeared to be the place where the water was coming from and it was located at the center of the dam 3 feet from the top. The water was coming straight through the dam itself and exiting downstream.

Mr. Watkins stated that the area from where the water was exiting indicated to him that the dam had a high "phreatic line" which is a line indicating the water level within the dam, and it is a critical sign of instability. The higher the level of the phreatic line, the lower the level of stability of the dam (Tr. 100-105). When he arrived at the water pump location, he observed two 10-inch pump lines, one above the other, discharging water, and the lines were washing away the earth part of the dam's structure. A gully and channel were being created by these water lines. The gully was 8 feet deep, 6 feet wide and 18 feet long, with a 32-degree slope. It was his opinion that the sloped gully hole was a significant factor in causing the dam to be unstable (Tr. 107). He also observed a soft sink hole where he could push anything into it and the object would completely disappear. The sink hole was a sign that the dam was heavily saturated with serious voids in its structure. In addition to the pumping of the water, the existence of vegetation was a factor in causing the dam to be unsafe in that when the trees die, their roots leave holes where water can enter the earth embankment, thus carrying particles that create larger holes and erosion which can create a pumping type of failure. In his opinion, the water was flowing through the earthen part of the dam, the dam was capable of collapsing, and, the water in the dam was capable of flooding the mine (Tr. 109-110).

On cross-examination, Mr. Watkins, testified that his conclusions were based on visual observations rather than engineering tests. He testified that he did not compute the water volume and depth, and he believed that the water that flowed at the bottom of the dam was due to seepage rather than runoff (Tr. 112-115). Although MSHA did not conduct a stability analysis on the dam, he believed that the concrete-stone abutment could have retained the water even if the earth breastwork had washed away (Tr. 116-119).

On redirect examination, Mr. Watkins testified it is likely that the remaining concrete-stone impoundment would fail if the earth embankment had washed away (Tr. 120). The washing away of the downstream face of the dam by two 10-inch lines was the primary reason for the issuance of the imminent danger order. When the pumping stopped it was his opinion that the imminent danger had ceased. The water content of the dam is 29 feet, and the volume of water is 51 acre-feet. Based on the 51 acre-feet, the water level would reach the mine property if the dam collapsed, but there is no data or estimates available that would change his opinion about water flooding the mine property (Tr. 129-130).

On recross-examination, Mr. Watkins testified that the concrete stone structure behind the earth structure may have withstood the water pressure, and if there was an instantaneous collapse, the water would reach the mine preparation plant but not the mine shafts (Tr. 131-133).

Mr. Watkins testified that if the water impoundment was located on mine property, it would fall under the Federal jurisdiction of the Secretary of Labor, and would be within the purview of Part 77 dealing with water impoundment regulations (Tr. 133). The reason the dam does not fall under the Part 77 water impoundment regulations is that it is not owned by Consolidation. If the dam is not covered by Part 77 regulations, the Secretary has no jurisdiction to act, and MSHA does not have any jurisdiction over the dam structure (Tr. 134). However, when the dam endangers miners, withdrawal orders are issued notwithstanding the fact that other agencies may have direct jurisdiction and control over the dam (Tr. 137).

Inspector Ash was recalled and testified that with regard to the previous December incident concerning the possibility of the dam collapsing, MSHA assigned an inspector to make a routine inspection for the purpose of determining whether Consolidation had withdrawn the miners from the mine. It was reported that miners were withdrawn and several unidentified agencies were at the dam site. Since MSHA had no jurisdiction, he advised the inspector not to get involved. Mr. Ash confirmed that miners were voluntarily withdrawn without any orders being issued by MSHA, and had they not been withdrawn, a withdrawal order would probably have been issued by MSHA (Tr. 138-140).

MSHA mining engineer Edwin Brady, testified that he is a graduate of the University of West Virginia and since 1976 has specialized in waste impoundments and water hydraulics. Specifically, he has served MSHA in an engineering capacity reviewing impoundment designs and dam projects to determine whether they comply with the regulations (Tr. 141). On February 27, 1979, he and Mr. Watkins inspected the Four States Water Reservoir. He arrived there at 8:30 a.m., and walked up and down the dam, including the area downstream. In measuring the dimensions of the dam, he found that it was 255 feet wide, 800 feet long, 29 feet high, with a slope angle of 27 degrees. He took 14 photographs of the dam and described them by means of a slide projector (Exhs. 1-14, Tr. 146). He conducted two studies of the dam to determine the effects of a dam collapse, and based on a UD-16 soil conservation service field mechanical method, it was determined that if there was a 50-foot breach in the dam, the water elevation level on the average would approximately come to 1,040 feet and would reach the mine railroad yard and a small area beyond that, but, below the buildings and shafts (Tr. 147). Using the UD-16 method, the depth of the water reaching the railroad yard could not be determined because of a lack of data concerning the elevation of the mine property (Tr. 148). However, in his opinion, if there was a complete collapse of the dam, the water level would be at an 8-foot level at the railroad yard area, and this opinion is based on the fact that the distance between the dam and Mine property is 1,600 feet and the elevation in the railroad yard is 1,032 feet (Tr. 148-149).

On cross-examination, Mr. Brady testified that no one, including MSHA, has yet determined the actual depth of the reservoir, and his calculations are based on information submitted by another governmental agency. He did not use any other engineering methods to determine the depth of the dam, but hand instruments were used to compute calculations on the dam and these were compared with the other data supplied to him (Tr. 152). Based on his observations at the dam, he did not believe that an instantaneous break would occur, but that a partial failure would occur. The "worst thing" that could have occurred was an instantaneous, rather than partial break, and in this event his calculations indicated that there would have been 8 feet of water at the mine property on the railroad track, and with a partial breach, there would have been 6 feet at that location. With an instantaneous breach, the water itself would never have reached the mine shafts or preparation plant, but would have reached the upper portions of the railroad track as shown on the topographical map (Exh. G-4). Based on the elevations and topography as depicted on the map, the primary flow of water from the dam in the event of a break would be out to the left rather than directly at the mine shaft and preparation plant, and his visual observations upon visiting the dam site confirmed this fact.

Mr. Brady stated that based on his after-the-fact calculations, he would have withdrawn men from the lower part of the railroad yard which is associated with the car-dropping process, but he would not have withdrawn them from the preparation building itself or from the underground mining facilities. In his view, the only persons in possible danger were those who may have been located in the railroad track area below the actual preparation plant in an area depicted within contour line 1,040 as shown on the map (Tr. 152-158).

In response to UMWA questions, Mr. Brady stated that based on his study of the situation, if the dam totally collapsed and the water came down the hollow, it would not reach the mine portal. Under certain conditions, the recreation center building located down the middle of the hollow could possibly determine the flow of water, but this would be hard to define (Tr. 160).

Testimony and Evidence Adduced by the UMWA

Betty Garrett, Chairperson of the Four States Public Service District, testified that her agency did not exercise any legal authority over the dam, including the water pump system, when Withdrawal Order No. 0814153 was issued on February 26, 1979 (Tr. 163). When her agency obtained ownership of the dam in May 1979, she became involved in attempting to resolve the matter when no one wanted to do anything about the imminent threat. The

State Department of Natural Resources and the U.S. Corps of Engineers would take no action other than to conduct dam studies. Her attempts at locating the dam owners came about as a result of the fact that Federal funds to aid in a dam stability analysis, or to effect repairs, which has still not been done, are only available if the dam is not privately owned. Prior to her agency's involvement, the previous owners were the Rochester & Pittsburgh Coal Company and a Mr. Daniel Hall, who was the operator of the water system, and those are the entities from whom her agency obtained the deed to the dam.

She was at the dam at approximately 5 p.m., on the day MSHA's order issued and she wondered why no one was there watching the pumps since she was concerned that school children ride in and out of the area on a school bus. She has never determined who started the pumps which were pumping the water. She telephoned a Mr. Gene Straight at the Fairmont Civil Defense Office and he did not know who started the pumps, but Mr. Daniel Hall came to the dam the same evening and turned them off. Mr. Hall denied starting the pumps and told her there was nothing he could do since he did not start them.

Mrs. Garrett testified further that she hopes the dam will be repaired and she is still attempting to get someone to conduct a stability study. In the meantime, pumping will again be done when the water level rises, and this will be monitored by her agency and the State Department of Natural Resources. She was told that the water level must be maintained 2 feet below the spillway level. In the event the water level rises again, her agency will notify the Department of Energy as well as the people downstream, including the mine itself. The dam is the only source of local water supply (Tr. 163-166).

On cross-examination, Mrs. Garrett stated that the tractors which were pumping water are controlled by the Civil Defense Office but owned by the State Department of Highways. The orders to keep the water level 2 feet below the spillway came from a report made by the Department of Natural Resources and the U.S. Corps of Engineers. Those reports reflect that the dam is "a high hazardous potential structure, introducing imminent threat to the people below the dam" (Tr. 168). Her agency now owns the land that the water is on and the water and waterworks, but the Four States Community has been using the water as their water source since 1911 (Tr. 168, 172). However, she also later indicated that Four States has been using the water at the dam as a source of their water supply since 1946 or 1948 (Tr. 173).

Mrs. Garrett related her attempts to ascertain the owner or owners of the dam through the search of tax and deed records at the local courthouse. She believed that the last owner was the R & P Coal Company, but since Consolidation Coal paid taxes for land in Four States she also assumed that Consol owned it, but she confirmed that the deed came from R & P, and that at the time of the prior dam problems last December, R & P owned it, but Four States was buying the water from Mr. Hall, who in turn had leased the water rights from R & P. She entered into negotiations on behalf of her agency to purchase the dam from R & P, and this occurred on May 22, 1979 (Tr. 171). Her interpretation of the deed is that "It gives us the ground so that we could do something with the dam. That's all. The dam; it gives us the dam." (Tr. 180).

Earnest W. Michael, chairman of the Consol No. 20 Mine Safety Committee, testified that he was notified of the withdrawal order 45 minutes after it was issued, and he and fellow safety committeeman Gary Riggs went to the dam and walked around looking at the conditions. He expressed agreement with the contents of the imminent danger order as issued, including the finding of imminent danger. The next day, he met with company officials and safety inspectors, and Inspector Ash advised Consol employee Mauck that if he could guarantee that no more water would be pumped down over the crest of the dam the order would be lifted. Mr. Mauck assured him that he would make sure the pumping was stopped (Tr. 186-189).

On cross-examination, Mr. Michaels testified that neither MSHA nor anyone else ever led him to believe that Consol had anything to do with the pumping at the dam, but he always believed that Consol owned the dam. He has worked at the No. 20 Mine for 8 years and it was his understanding that Consol owned the dam and the property around it (Tr. 192).

Michael P. Zemonick, president of the UMWA local, and an employee of Consol, testified that he was scheduled to work at the mine on December 9 and 10, 1978, but was advised by mine superintendent Darrel Auch that in view of a reported danger at the dam all work for those 2 days had been cancelled, and he did not work that weekend. He participated in the meeting the day after the order in question was issued, and he believed that mine management was trying to contact Mr. Hall to take care of the dam so that the mine could return to production. He indicated that "some people" say that Mr. Hall owns the dam, but that "it is really not known" (Tr. 195).

Applicant's Testimony

Kent Simmons, preparation plant foreman, testified that the order in question was served on him on the evening of February 26, 1979, after Inspectors Ash and Bowers advised him that they were going to shut the mine down because the dam was in danger of bursting and that the water would go down the mine shafts. Mr. Simmons then telephoned mine superintendent Jordan, and the inspectors left to return to the dam, and after some 15 minutes, they again came to the mine and told him they were writing an order and that miners should be withdrawn, and by 9:15 a.m., everyone was out of the mine. Mr. Simmons did not go to the dam and had no personal knowledge as to what was there. Responding to a question about the physical mine layout near the preparation plant, Mr. Simmons testified that railroad cars are filled one at a time with coal, uncoupled, and then dropped off for shipment by a car dropper who spends 5 to 10 percent of his time in the coal yard, and he is usually the only person there (Tr. 217).

On cross-examination, Mr. Simmons testified that coal miners walk down by the tipple rather than the lower end of the railroad tracks to get to the privately-owned recreation center, and that occasional maintenance work is performed at the tipple (Tr. 219). With regard to the recreation center, Mr. Simmons stated that it is not located on mine property and is privately owned and operated by someone in the community (Tr. 220).

Eugene L. Jordan, general mine superintendent, Consol No. 20 Mine, testified that he received a phone call from Mr. Simmons at approximately 8:15 the evening of February 26, and he advised that MSHA inspectors Ash and Bowers were concerned about the dam. He spoke with Mr. Ash who informed him that the dam was in a "dangerous condition" because someone was pumping water there. Mr. Ash inquired as to the identity of the person doing the pumping and Mr. Jordan suggested a contact with Mr. Dan Hall because he (Jordan) believed that Mr. Hall was in charge of the water system or, in the alternative, a contact with Mrs. Garrett. Mr. Ash called him again and advised him that a withdrawal order would issue against Consol but that it will note that "it is no fault of Consolidation Coal Company." Mr. Jordan did not visit the mine after the order issued, but he did go there on the morning of February 27, and he also went to the dam site at approximately 8:30 a.m. that morning, and the pumps were not operating. He subsequently learned that they ran out of gas. He observed the dam conditions, including the gulley which had been washed out, and he stated that the dam did not appear any different from the way he observed it on any other day (Tr. 220-226).

Mr. Jordan testified that he had previously observed the dam weekly during his travels along the dam road, and he considered buying a home nearby but did not do so because of the dam and his fear that his young son might fall into it. The morning after the order issued, and while at the dam, he observed the water seepage through the dam breastwork, but was not concerned about it. Since the order issued, he has traveled back and forth from the dam site no less than three times a week and has observed no one performing any reclamation work at the site, although he has observed the water level at the same height or higher than it was on February 27. He testified that Mr. Mauck, who is now retired as a company vice president, advised Inspector Ash that although Consol has nothing to do with the dam, he would look into the water pumping situation (Tr. 226-231).

Mr. Jordan testified that Mr. Daniel Hall is employed by Consol as a bratticeman, but that Consol is not involved with the dam at all. Mr. Hall advised him that he started the pumps on the advice of the state agency who controls the dam, and the state agency purportedly told Mr. Hall that the water should be pumped when it reaches close to the spillway. Mr. Hall advised him that he would in the future extend the pumping lines beyond the area of the wash-out and that was the last time he saw Mr. Hall (Tr. 233). The pumps were not owned by Consol and Consol had nothing whatsoever to do with the dam (Tr. 234). Mr. Jordan stated that it was his opinion that on February 27 the dam was not in such a condition that it posed a threat of serious injury or death to the miners at the mine (Tr. 236). Mr. Jordan stated that Mr. Ash agreed that he could keep supervisory personnel in the mine after the order issued in order to keep it from flooding (Tr. 238).

On cross-examination, Mr. Jordan testified that he has never been concerned about the dam because he has gone by it "hundreds of times" since 1969. He indicated that on December 7, 1978, representatives of the U.S. Corps of Engineers and the State Department of Natural Resources visited his office at the mine and expressed concern over the fact that water was going over the dam spillway. The state police were also present and people were being evacuated from the area, and water was being pumped from the dam by the local fire department. Although he was not particularly concerned, men were withdrawn from the mine shaft but not from the preparation plant. He was not concerned because he had observed the dam "come up and down for ten years" and based on his visual observations and judgment, even if the dam had totally collapsed the water would not have reached the shafts because the shafts are at a higher level than everything else (Tr. 243-244). The Corps of Engineers has never advised him that it did not think the dam was safe, but did tell him it was in a deteriorating condition (Tr. 245).

Mr. Jordan stated that Mr. Hall charges his customers directly for the water used from the dam, and while he owns the water system, he did not know whether Mr. Hall also owns the dam (Tr. 253). Regarding the water that was being pumped from the dam on the evening the order issued, Mr. Jordan testified that his "concern" over that condition would depend on the appearance of the gulley and whether it was eroding "a whole lot of the face of the dam away or just the small amount it did" (Tr. 256). Assuming that the pumping had continued continuously for a couple days, that would possibly have concerned him (Tr. 256). Since Consol did not own or control the dam, he was not going to send anyone there to shut the pumps down in order to abate the order (Tr. 257).

DISCUSSION

The Concept of Imminent Danger

"Imminent danger" is defined in section 3(j) of the Act, 30 U.S.C. § 802(j) as: "The existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

Section 107(a) of the Act provides as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the condition or practice which caused such imminent danger no longer exists.

> The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

The legislative history with respect to the concept of "imminent danger," Committee on Education and Labor, House of Representatives, Legislative History of Federal Coal Mine Health and Safety Act of 1969 at page 4 (March 1970), states in pertinent part as follows:

> The definition of an "imminent danger" is broadened from that in the 1952 Act in recognition of the need to be concerned with any condition or practice, naturally or otherwise caused, which may lead to sudden death or injury before the danger can be abated. It is not limited to just disastrous type accidents, as in the past, but all accidents which could be fatal or nonfatal to one or more persons before abatement of the condition or practice can be achieved. [Emphasis added.]

And, at page 89 of the report:

> The concept of an imminent danger as it has evolved in this industry is that the situation is so serious that the miners must be removed from the danger forthwith when the danger is discovered * * *. The seriousness of the situation demands such immediate action. The first concern is the danger to the miner. Delays, even of a few minutes may be critical or disastrous.

The former Interior Board of Mine Operations Appeals has held that an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner or normal mining operations are permitted to proceed in the area before the dangerous condition is eliminated. The dangerous condition cannot be divorced from normal work activity. Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals, et al., 491 F.2d 277, 278 (4th Cir. 1974). The test of imminence is objective and the inspector's subjective opinion need not be taken at face value. The question is whether a reasonable man, with the inspector's education and experience, would conclude that the facts indicate an impending accident or disaster, likely to occur at any moment, but not necessarily immediately. Freeman Coal Mining Corporation, 2 IBMA 197, 212 (1973), aff'd, Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, et al., 504 F.2d 741 (7th Cir. 1974). The foregoing principles were reaffirmed in Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, et al., 523 F.2d 25 (7th Cir. 1975), where the court, following Freeman, phrased the test for determining an imminent danger as follows:

> [E]ach case must be decided on its own peculiar facts. The question in every case is essentially the proximity of the

> peril to life and limb. Put another way: Would a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any momemt, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger.

In a proceeding concerning an imminent danger order, the burden of proof lies with the applicant, and the applicant must show by a preponderance of the evidence that imminent danger did not exist. *Lucas Coal Company*, 1 IBMA 138 (1972); *Carbon Fuel Company*, 2 IBMA 43 (1973); *Freeman Coal Mining Corporation*, 2 IBMA 197 (1973). However, since withdrawal orders are "sanctions" within the meaning of section 7(d) of the Administrative Procedure Act (5 U.S.C. § 556(d) (1970)), and may be imposed only if the government produces reliable, probative and substantial evidence which establishes a prima facie case, MSHA must bear the burden of establishing a prima facie case. It should be noted that the obligation of establishing a prima facie case is not the same as bearing the burden of proof. That is, although the applicant bears the ultimate burden of proof in a proceeding involving an imminent danger withdrawal order, MSHA must still make out a prima facie case. Thus, the order is properly vacated where the applicant proves by a preponderance of the evidence that an imminent danger was not present when the order was issued. *See*: *Lucal Coal Company*, *supra*; *Carbon Fuel Company*, 2 IBMA 43 (1973); *Freeman Coal Mining Corporation*, *supra*; *Zeigler Coal Company*, 4 IBMA 88, 82 I.D. 111 (1975); *Quarto Mining Company and Nacco Mining Company*, 3 IBMA 199, 81 I.D. 328, (1973-1974); *Kings Station Coal Corporation*, 3 IBMA 322 81 I.D. 562 (1974).

The Seventh Circuit also noted in its *Old Ben* opinion that an inspector has a very difficult job because he is primarily concerned about the safety of men, and the court indicated that an inspector should be supported unless he has clearly abused his discretion (523 F.2d at 31). On the fact presented in *Old Ben*, the court observed that an inspector cannot wait until the danger is so immediate that no one can remain in the mine to correct the condition, nor can the inspector wait until an explosion or fire has occurred before issuing a withdrawal order (523 F.2d, at 34). Thus, on the facts presented in this proceeding, MSHA must show that reasonable men with the inspectors education and experience would conclude that the water being pumped out of the dam over and down the earthern breastwork at such a rate which was causing a gulley and other erosion and washing away of materials to occur constituted a situation indicating an impending accident or disaster, likely to occur at any moment, but not necessarily immediately.

Arguments Presented by the Parties

Applicant Consolidation Coal Company (Consol)

In its posthearing brief, applicant traces the chain of title to the dam and maintains that this is conclusive proof that the subject fresh water dam is not owned, operated, or controlled by Consol. In addition, applicant states that MSHA has admitted that this is in fact the case, and that the inspectors themselves testified and conceded that they have no jurisdiction over the dam structure.

With regard to the existence of any imminent danger on the day the order issued, applicant argues that a literal reading of the definition of the term "imminent danger" as it appears in section 3(j) of the Act, coupled with the definitions of "coal or other mine" as set forth in sections 3(h)(1) and (2), clearly establishes that the condition or practice purported to be an imminent danger must exist in a coal or other mine as defined by the Act, and that the water dam area in question obviously does not come under any definition of coal mine or coal property. Applicant maintains further that section 302 of the 1977 Amendments Act, which established MSHA in the Labor Department, did not grant to MSHA broad general police powers as the protector of all mankind and the enforcer of all laws, but limited its jurisdiction to the provisions of the Act, namely enforcement powers for mining activities.

With respect to the independent contractor cases such as MSHA v. Republic Steel, decided April 11, 1979, holding an owner responsible for violations where it lacked control or was not at fault, applicant points out that in all of these cases the conditions or practices cited existed in a coal mine over which MSHA had jurisdiction. Regarding the recent decision in Westmoreland Coal Co. v. Mine Safety and Health Review Commission, 606 F.2d 417 (4th Cir. 1979), where the Commission upheld the closing of a mine because of the danger of flooding from an adjacent mine, applicant argues that it is obvious that the condition or practice in that case was caused by and located in an adjacent coal mine, and that MSHA had jurisdiction over the condition or practice because of the definition of coal mine as found in section 3(h)(1), section 3(h)(2), and section 318(1) of the Act. In the instant case, applicant points to the fact that the fresh water dam, which was the condition giving rise to the issuance of the order, is not to be found within any of the jurisdictional guidelines given to MSHA. Applicant maintains that if MSHA is allowed to construe their jurisdiction as covering extrinsic factors as conditions or practices which can cause an imminent danger the boundaries are limitless. An inspector could believe that Skylab or a similar satellite might fall on a mine; an inspector might believe that a nuclear reactor accident would affect a mine five or more miles away; an inspector might believe that Boulder Dam would burst and flood a mine 20 miles away. The possibilities are endless. As in this case, if there was a danger of a dam breakage, Applicant maintains that the police powers of the State of West Virginia would authorize civil defense or police-related authorities to evacuate people including miners at the mine who might be in danger. The civil authorities, who are more experienced in these matters, did not envision any danger since they did not request that anyone, including residents of the homes directly below the dam be evacuated.

With regard to the existence of "imminent danger, applicant cites the court decisions in *Eastern Associated Coal Corporation* v. *Interior Board of Mine Operations Appeals*, 491 F.2d 277, 278 (4th Cir. 1974), *aff'g Eastern Associated Coal Corporation*, 2 IBMA 128, 136 (1973), and *Old Ben Coal Corporation* v. *Interior Board of Mine Operations Appeals*, 523 F.2d 25 (7th Cir. 1975), where the court affirmed the Secretary's determination that an imminent danger exists when the condition or practice observed could *reasonably be expected* to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated. However, applicant argues that in order to determine "reasonable actions," one must consider the inspectors' training and experience. In this case, applicant asserts that while Inspectors Ash and Bowers may have been qualified inspectors for underground coal mining, they were novices in the area of dam evaluation. In support of this premise, applicant cites the testimony of Inspector Ash indicating that his total training in evaluating water impoundments consisted of a course lasting 5 working days at an average of 6-1/2 hours per day (Tr. 43). The training consisted of lectures and visual aids in the form of slides of various impoundments (Tr. 42-44). Training was not given in methods of calculating structural stability or water volume but merely in recognizing dangerous conditions (Tr. 42-44). Further, the training dealt with earthen dams, not with dams having solid wall construction (Tr. 43). The training was conducted in a classroom (Tr. 42-44). Likewise, applicant cites the testimony of Inspector Bowers indicating that his total training was exactly the same as that of Mr. Ash (Tr. 86). He had the same 5 days at the rate of 6-1/2 hours per day (Tr. 86). Applicant maintains that the two inspectors, with only 32-1/2 hours of training each in water impoundments were certainly not qualified to make a judgment as to whether or not the fresh water supply dam was in danger of bursting.

With regard to the conditions which prevailed on the evening of February 26, 1976, when the order issued, applicant argues that it was already dark when the inspectors arrived at the dam site, and that the only means of lighting was the inspectors mine cap lamps (Tr. 44). Inspector Ash testified that the lamps normally shine 90 to 100 feet, but that night in the rain, snow, wind and fog, it was somewhat less (Tr. 45). The inspectors did not know the depth of the water in the dam (Tr. 46). Nor did they know its actual length or width (Tr. 48). Therefore, there is no possible way a reasonable calculation of the water volume behind the dam could have been made. Therefore, prior to the issuance of the order at about 8:30 p.m., on February 26, 1979, the inspectors only had less than 1 hour to visually observe the dam in adverse weather conditions. They saw some wet areas on the face of the dam and alleged three areas where they believed water was flowing (Tr. 47-49). However, they only assumed the water was coming through the dam when it could have been run off from outside water sources. The primary area of concern was a ditch that was being created by water discharging from hoses connected to the two pumps. However, it turns out that when issuing the order, the inspector did not know how much water was in the dam; he did not know where water seepage on the breast of the dam was coming from; he did not know what material the dam was constructed from; he did not know its stability; he could not determine if a partial bursting or if a total instantaneous burst would take place. With all of these unknowns, one would contend that if an inspector is alleging that water is going to flood a mining area he cannot just guess at it. He must have a reasonable idea of the amount of water that he speculates might be rushing toward the mine. In this case, applicant suggests the inspector could do nothing more than guess as to all factors involved which is certainly not reasonable.

Finally, applicant argues that after the order was issued, MSHA's own engineering studies and the testimony of its dam engineering expert, Mr. Watkins, established that even if there was a complete instantaneous burst of the dam, that the water would never have risen to a level that it would go down the shaft into the mine (Tr. 133). Mr. Watkins testified:

> (Skrypak) Q. Based on what you know now, would that water have reached the Preparation Plant or the shafts where the men go into the mine?
>
> (Watkins) A. Based upon what I know now, I would say that it would not go down the openings into the shaft.
>
> (Skrypak) Q. It would not go down the shaft?
>
> (Watkins) A. It would not go down the shaft.
>
> (Skrypak) Q. So although the inspectors did not know it on that night, the water, even assuming an instantaneous burst of that dam, would not have made it go down the shaft; is that correct?
>
> (Watkins) A. Right. That is our engineering judgment. [TR 133]. [Emphasis added.]

In summary, applicant's case rests on its assertions that while many state and Federal agencies had been involved with the fresh water dam in question and seemed to do nothing, MSHA is attempting to make Consolidaton Coal Company a scapegoat. Since MSHA does not have jurisdiction over the dam which is not owned, operated or controlled by a coal company, and since it does not fall within any definition of a coal mine, applicant claims MSHA lacks jurisdiction to issue any withdrawal orders. And, since an imminent danger must exist in a coal mine and not be an extrinsic causal factor, applicant asserts the testimony clearly establishes that the inspectors did not have the training or experience to make a reasonable judgment, and that even the crudest training or general common sense would dictate that the inspectors should have had some knowledge of the volume of water involved, which these inspectors did not.

Respondent MSHA

Citing the precedent cases dealing with imminent danger, *Freeman Coal Mining Company*, *supra*; *Eastern Associated Coal Corporation*, *supra*, and *Old Ben Coal Corporation*, *supra*, MSHA argues that given the facts described in the record of testimony and on the face of the withdrawal order, the inspectors had no possible course of action other than to issue an 107(a) order withdrawing miners from coal mine property until the hazardous condition could be abated. Given the circumstances presented on the night of February 26, 1979, MSHA believs that no reasonable man charged with the responsibility for protecting the lives and safety of miners on coal mine property, could possibly have acted otherwise. MSHA asserts that the action of the inspectors completely satisfied the reasonable standard test set out in *Freeman*. The inspectors were authorized representatives with extensive mining experience; they had received specialized training for just such a situation as presented in this case which required a decision concerning the stability of a dam. Inspector Ash was personally familiar with the size and structure of the dam as well as its location with respect to the mine below it. Both inspectors were aware, as a result of a prior incident that occurred in December 1978, when state officials had evacuated families from the area below the dam and Consol officials had voluntarily evacuated miners from the mine before an inspector arrived in the area because of a feared dam collapse resulting from heavy rainfall, that the dam had been classified as highly unstable and had been recognized as a genuine threat. Further, MSHA argues that after inspecting the dam for signs of general instability, the inspectors determined that the continuing eroding of the earthen structure resulting from the high pressure water discharge would likely lead to collapse of the structure unless the pumping were terminated. Proceeding to mine property, and upon further investigation, they determined that the six (6) inches of water already covering the ground in the tipple area was leakage from the dam. They then explained to mine management the conditions observed by them and the reasons why an imminent danger existed at the mine, requiring the immediate withdrawal of those working there.

Based on the foregoing arguments, MSHA concludes that an imminent danger as defined under the Act and under controlling Board and court decisions existed as alleged and that the inspectors acted reasonably, and in accordance with legal precedents in ordering the immediate withdrawal of the miners. Further, MSHA asserts that the applicant has failed to sustain its burden of proof with respect to both the threshold issue of no danger and the issue of imminence. In support of this argument, MSHA argues that while Consol put forward two witnesses, neither of them could offer any eye-witness testimony concerning the issues of danger or of imminence and no direct evidence was offered by the applicant in this regard. MSHA concludes that the applicant has failed to rebut by a preponderance of the evidence the presumption of imminent danger which arose when the order was issued.

With regard to applicant's argument that the imminent danger order of withdrawal is invalid because it cannot be held responsible for the condition which caused the imminent danger on coal mine property and that the water dam in question is not owned, operated or controlled by applicant and therefore, not subject to MSHA's jurisdiction, MSHA contends that both arguments must be rejected. In support of its position, MSHA points out that the section 107(a) order in question itself states that "this order is issued through no fault of the company," and that unlike orders of withdrawal issued pursuant to sections 104(d)(1) and (2), in which an inspector must find that there there has been a violation of a mandatory health or safety standard and that such a violation was caused by the unwarrantable failure of the operator to comply, the valid issuance of an order issued pursuant to section 107(a) does not require the finding of a violation of a mandatory standard or any negligence attributable to the operator. Section 107(a) simply states that upon the finding that an imminent danger exists, an order requiring the operator to withdraw all persons from the affected areas shall be issued. The question in this proceeding, asserts MSHA, is not whether the imminent danger as alleged was caused by applicant, but rather, whether an imminent danger existed as alleged for miners working at the Consolidation Four States No. 20 Mine. Citing the case of District 6 United Mine Workers v. United States Department of the Interior Board of Mine Operations Appeals, 562 F.2d 1260 (1977), where the court held that imminent danger could exist even without any failing by the mine operator, for example, as a result of natural causes; whereas the other closures all involve some negligence by the operator. MSHA points to the court's citation from the legislative history of the Act which states that:

> The concept of an imminent danger as it has evolved in this industry is that the situation is so serious that the miners must be removed from the danger forthwith when the danger is discovered without waiting for any normal proceedings or notice. The seriousness of the situation demands such immediate action. The first concern is the danger to the miners. Delays even of a few minutes may be critical or disastrous. After the miners are free of danger, then the operator can expeditiously appeal the action of the inspector. The imminent danger may be due to a violation of a mandatory safety standard or some other cause not covered by a standard, including natural causes. Senate Report No. 91-411 91st Congress, 1st Session 90 (1969).

Finally, MSHA argues that the language of section 107(a) and the definition of imminent danger in the Act specifically and deliberately exclude any considerations of liability, cause, or negligence upon the part of a mine operator, and that nowhere in the language of the Act or in its legislative history can there be found any basis for restricting an imminent danger to a situation whose cause, natural or otherwise, exists on mining property. Citing District 6 United Mine Workers, supra at 1267, MSHA states that Congressional hearings, statutory language, and judicial review all support the fact that "the clear intent of Congress is that coal mines, or areas of coal mines, in which imminent danger was found to exist must be evacuated at once, with the benefit of any doubt cut in favor of withdrawal." The unmistakable intent of Congress is that it matters not one whit what caused the imminent danger; the sole concern is that miners on mine property be evacuated immediately. MSHA concludes that to adopt the narrow, restrictive meaning of imminent danger proposed by applicant in this proceeding would be in direct conflict with case law dealing with the interpretation of federal coal mine safety legislation, and it cites *St. Mary's Sewer Pipe Company* v. *Director of U.S. Bureau of Mines*, 262 F.2d 378, 381 (3rd Cir. 1959), where the court said: "It is so obvious as to be beyond dispute that in construing safety or remedial legislation, narrow or limited construction is to be eschewed."

MSHA suggests that the interpretative principles set out in *St. Mary's Sewer Pipe*, have been reaffirmed in the judicial decisions it has cited in support of its case, and that the Conference Committee Report in the legislative history of the 1969 Act further evidences the intention of Congress, in stating as follows: "*In adopting these provisions, the managers intend that the Act be construed liberally when improved health or safety to miners will result*." Conference Report No. 91-761, 91st Cong. 1st Sess. at 62.

Respondent UMWA

Respondent argues that the imminent danger in this case is the potential of flooding the surface and underground of Consol's Four States No. 20 Mine by the bursting of the Four States dam, which is classified as a "high hazard potential structure * * *." The dam is a high hazard potential structure, "because there is a chance of loss of more than a few lives should failure occur" (UMWA Exh. I, at 2). Citing the Fourth Circuit Court decision in *Westmoreland Coal Company* v. *Mine Safety and Health Review Commission and Marshall*, 606 F.2d 417 (1979), respondent argues that the condition or practice does have to exist in the mine that is shut down by a closure order, and the miners do not have to be working at the time a closure order is issued. Respondent asserts that in the *Westmoreland* case, the court upheld MSHA's closing of Westmoreland's Hampton #4 Mine because of the possibility that the mine could be flooded with water from an abandoned, adjacent mine, and that the court affirmed the Secretary's enforcement action, even though the source of the imminent danger did not exist in the mine that was owned, controlled, or operated by Westmoreland.

Respondent argues that the question of fault and control on the part of a mine operator are not prerequisites to the issuance of a closure order, and in support of this argument cites the Commission's decision of April 11, 1979, in *MSHA* v. *Republic Steel Corp.*, Dockets MORG 76-21 and MORG 76-95-P, holding Republic responsible for violations created by its independent contractor even though Republic could not have prevented the violations. Respondent asserts that in both *Westmoreland* and *Republic*, the operator who was subjected to the Secretary's enforcement action did not control the area in which the dangerous condition existed, and although in each instance, the operator who received the withdrawal order could not have prevented the dangerous condition from occurring, neither of these facts was considered an adequate reason for vacating the withdrawal order at issue and, in each case, therefore, the Secretary's enforcement action was upheld.

Citing a number of cases at page 9 of its brief, respondent argues further that the reasonableness of the Secretary's construction of section 107(a) is apparent, since the Secretary has followed the mandate of Congress and the Courts that the Act be construed liberally in order to promite its primary purpose, that of promoting safety in the mines. Citing the legislative history of the 1977 Act, Senate Report No. 95-181, 95th Cong., 1st Sess. (1977), respondent states that the Senate Committee Report rejected a construction of "imminent danger" which would require a finding by an inspector that it would be as likely as not that a serious injury or death would result before a condition might be abated. The report stated:

> The Committee disavows any notion that imminent danger can be defined in terms of a percentage of probability that an accident will happen; rather the concept of imminent danger requires an examination of the potential of the risk to cause serious physical harm at any time. It is the Committee's view that the authority under this section is essential to the protection of miners and should be construed expansively by inspectors and the Commission. Since we are dealing with situations where there is an immediate danger of death or serious physical harm. The Committee intends that the Act give the necessary authority for the taking of action to remove miners from risk. [Emphasis added.]

Turning to the evidence and testimony adduced at the hearing, respondent points to the fact that Consol admitted some involvement with the dam and was aware of its condition in that it had given some piping to someone who ran the waterworks, but has since discontinued the practice. In addition, respondent argues that the testimony reflects that Consol employee Daniel Hall ran the water works, that mine superintendent Jordan contacted him about the pumping of the water, and that then Consol vice president Mauck prevailed on Mr. Hall to take certain steps to prevent any future incident involving the pumping of water over the face of the dam. Respondent believes it is apparent on the facts here presented that an employee of Consol, Mr. Mauck, felt he would be able to take steps to protect the miners from an imminent danger in the future. Respondent concludes that the inspectors, after observing the water and the condition of the dam, could not disregard the miners' safety and acted reasonably in issuing the section 107(a) order, and that they need not wait until the water is on mine property before issuing a section 107(a) order.

In its reply brief, respondent UMWA comments on applicant's discussion of the jurisdictional and reasonable belief issues, and it points to applicant's counsel's comments at the hearing where he stated:

> Mr. Skrypak: "Your Honor, we have no problem with the idea of the reasonable belief of the inspectors. If it

> matters * * * *we would accept that, that the imminent danger order is based on a reasonable belief by the inspectors*. Our position is purely jurisdictional, that he did not have the jurisdiction over that outside force * * *." [Emphasis added.]

(Tr. 9, 11-17).

With regard to the applicant's arguments concerning the inspector's training and expertise in evaluating water impoundments, respondent states that applicant fails to mention that Mr. Ash has had 21 years of experience before joining MSHA, much of the time at the Four States No. 20 Mine, and that he was raised near the dam, saw it rebuilt, and knew the approximate size and dimensions of the dam (Tr. 17, 39). Further, respondent argues that while a stability analysis on the dam is not available, the Army Corps of Engineers' report classified it as a "hazardous structure," and in fact, asserts that the report had caused the pumping (which was the subject of the instant action) to be initiated in the first place because, when the water level raises, it must be kept 2 feet below the spillway (Tr. 145). Further, respondent argues that the term "reasonableness," as used in the Act, means reasonableness in the minds of the inspectors and not reasonableness as interpreted by applicant. Just as applicant cannot realistically expect the inspectors to wait until the water has reached mine property before issuing their closure order, so, too, applicant cannot expect to have only a dam expert issue the closure order. The inspector has adequate training to meet MSHA requirements and he was backed by the Army Corps of Engineers' study which stated that, whenever the water level rises, it must be kept 2 feet below the spillway for safety precautions. Thus, respondent again concludes that the 107(a) order was issued on a reasonable belief that the dam was in danger of bursting before abatement of the condition might occur which would endanger the lives of the miners working on the surface and underground at the Four States No. 20 Mine.

Findings and Conclusions

Were the conditions described by the inspectors an imminent danger, and if so, was the withdrawal order properly issued?

It is clear from the testimony of Inspectors Ash and Bowers that they believed the dam would weaken and collapse if the pumping of the water over the face of the dam and down the earthern embankment continued unabated. Their conclusion that this event was likely to occur was based on their observations of water being pumped and discharged in such a manner as to cause erosion of materials from the earthern breastwork of the dam, the formation of a gulley which grew in depth and breadth as they made their way across the dam structure during their inspection, water seepage which they attributed to a breach in the dam structure itself, other signs of instability which they described during their testimony in support of the withdrawal order, and their belief that had the dam collapsed, the surging water would go down the hollow and inundate the mine, including the surface preparation plant as well as the shafts. The inspectors' conclusions, both as to the existence of an imminent danger, and the conditions which they observed which led them to conclude that the dam would collapse if the pumping and discharging of the water continued unabated was supported by the testimony of MSHA engineer Watkins who arrived at the dam site an hour or so after the written withdrawal order was issued. Mr. Watkins examined the existing conditions, including the water level in the dam, several leaks which he believed were caused by seepage through the dam structure itself, the gully being formed by the pumping and discharging of water through the two lines described by the inspectors, sink holes, erosion being caused by the pumping, and the existence of a high dam phreatic or seepage line which he believed was a critical sign of the instability of the dam structure. Mr. Watkins also believed that with the existence of all of these conditions, the dam was capable of collapsing, and if it did, the water would flood the mine.

The thrust of applicant's defense to the imminent danger order is its belief that such an order may not be issued on the basis of an imminently dangerous condition which exists outside of or off mine property, and MSHA's lack of jurisdiction over the dam structure itself. Also, applicant maintains that the inspectors' lacked the necessary engineering expertise to make an informed judgment as to the stability of the dam and that an after-the-fact engineering study conducted by MSHA indicated that even if the dam had collapsed, the water would only have reached the perimeter of the mine property at the railroad yard and would not have innudated the preparation plant or the underground mine shafts.

Regarding the actual conditions observed by the MSHA inspectors and Mr. Watkins, none of the witnesses presented by applicant actually observed those conditions on the evening of February 26 when the order issued. Preparation Plant Foreman Simmons never visited the dam site and knew nothing about the conditions observed there. Mine Superintendent Jordan visited the dam site the day after the order issued and after the pumping and discharging of water had ceased. Although he expressed little concern over the condition of the dam, he agreed that had the pumping and discharge of water continued for a couple of days, that would have been of some concern to him. He also indicated that the erosion and formation of the gulley, which was the primary concern of the inspectors, would have concerned him only if more rather than less of the face of the earthern portion of the dam were affected by the erosion. It seems obvious to me that the continuous pumping and discharging of the water from the dam over and down the earthern breastwork of the dam would have increased, rather than decreased, the erosion, thus expanding the gulley being formed. Under the circumstances, taken in perspective, Mr. Jordan's "concerns" with respect to the erosion and the existence of the gulley coincides with the concerns of the inspectors.

After careful review and analysis of the testimony presented by MSHA in support of the closure order in question, I find and conclude that the inspectors acted properly in issuing the order and that their testimony supports their finding of an imminent danger. I am not persuaded by applicant's arguments concerning the lack of engineering expertise by the inspectors at the time they observed the conditions on which they based their action. It seems clear to me that the inspectors were qualified to make a judgement as to the existence of an imminent danger, that they were qualified mine inspectors of many years experience in mining, including the inspection of mines and the detection of any perceived hazards which may result from those inspections. Further, I do not believe that one necessarily has to be a professional engineer to determine whether an imminent danger actually exists. Those judgments may, and in fact are, made by inspectors in the normal course of their everyday mine inspections. The question presented is whether on the facts presented they acted reasonably in the circumstances presented on the evening of February 26, 1979. In this case, both inspectors were experienced inspectors and they had adequate training in the detection of conditions which could lead to the collapse of a dam structure. The fact that they were proved subsequently wrong with respect to the question of whether the water would actually reach the dam in the event of a collapse is immaterial to their judgement call made on the evening of February 26. The legislative history of the concept of "imminent danger," as well as the case law previously discussed herein makes it clear to me that the inspector's made the proper decision and that the facts and circumstances which they observed supports their judgement that an imminent danger did in fact exist at the time the order was issued.

Applicant's suggestion that an inspector must wait upon the arrival of a professional engineer or water impoundment expert, or must await the result of engineering studies before taking any action to insure the safety of miners is rejected. Faced with the situation of a possible dam collapse and the inundation of the mine from that collapse, the inspectors need not wait the results of further testing or studies before taking immediate appropriate action to protect the lives of miners. They are compelled to take prompt action, and to do anything less would endanger lives and lessen the impact of what Congress intended when it enacted the imminent danger withdrawal sanction of section 107(a). A literal application of applicant's argument on this point would require an inspector to sit back and wait until the water from the dam is running down the mine shafts before taking any action. On the facts presented here, if the inspectors had not acted and the pumping of water had continued unabated and uninterrupted, I conclude that it was just as probable as not that the earthern portion of the dam would have weakened and washed away to the point where it was likely that it would have collapsed and released a torrent of water downstream in the direction of the mine. Under the circumstances, it seems clear to me that the inspectors' intent in issuing the order was to remove the miners from the imminently dangerous position they were in and to insulate them from the possibility of being exposed to the water had it reached the mine shafts. Further, as pointed out by the UMWA in its brief, applicant's counsel more or less conceded during oral arguments at the hearing that the inspectors' finding of imminent danger was based on their reasonable belief that the conditions they observed presented an imminently dangerous situation.

May an imminent danger order be sustained in the basis of an imminently dangerous condition which exists off mine property?

After careful review and consideration of the arguments presented by the parties with respect to the question of whether extrinsic factors off mine property may serve as the basis for a finding of imminent danger affecting miners on mine property, I conclude and find that the arguments advanced by the respondents in this case are correct and that those advanced by the applicant must be rejected. While it may true that on its face, the definition of "imminent danger" as stated in section 3(j) speaks in terms of conditions or practices in a mine, it is also true and without question that the courts have construed the Act broadly and liberally so as to effectuate Congressional intent to insure the safety of miners while in their work environment. It seems clear to me from the legislative history and the court decisions cited by the respondents that the Act has been liberally construed on the side of safety and that once it is established that an imminent danger posing a threat to the lives and safety of miners has been established it matters not that the source of the imminent danger is some exstinsic set of circumstances. On the facts of this case, it seems clear that the imminent danger was the liklihood of a dam failure which the inspectors reasonably believed would have resulted in a torrent of water inundating the mine. In such circumstances, I cannot conclude that the inspectors acted unreasonably. Further, it seems clear that applicant too does not seriously contest the fact that such an imminent danger should be ignored. Aside from the legalistic and strict interpretation arguments advanced by the applicant in defense of the closure order, applicant still maintains that it would have voluntarily withdrawn miners without prodding from MSHA if in fact an imminent danger existed and that it did so in the past when it ceased mining operations and withdrew miners in December 1978 when the dam crested and resulted in an evacuation of persons downstream by several local agencies.

With respect to the question of whether MSHA had initial jurisdiction over the dam, the fact is that notwithstanding MSHA's own admission that it lacks inspection jurisdiction over the dam, the inspectors did venture on the dam property, albeit as trespassers, and determined that an imminent danger in fact existed. That is a fact that I cannot ignore, and coupled with the additional fact that the dam owner lodged no protest to the presence of the inspectors at the time the closure order was issued, I am constrained to apply the facts as I find them. Here, as previously found and concluded by me, the dam conditions as observed by the inspectors on the evening of February 26, constituted an imminent danger and they acted reasonably so as to protect the miners from harm. Under the circumstances, while the inspectors may not have had enforcement jurisdiction over the dam per se, they did have jurisdiction under the Act to determine the existence of any imminent danger to the miners and to take appropriate action to insure the safety of the miners and to insulate them from any hazards posed by that danger.

I believe it is clear from the evidence and testimony presented in this proceeding that applicant did not own, operate, or other control the dam structure which in fact created the imminently dangerous condition found by the inspectors on the evening of February 26, 1979. Further, while it is true that applicant did not initially create the imminent danger nor exercised any legal control over the abatement of the conditions which resulted in the imminent danger, it is clear from the facts presented in this case that the abatement was a direct result of applicant's exercise of its influence over the person who was manning the pumps. While Mr. Hall's status as an employee of Consol may not be considered in a technical sense as creating an employee-employer relationship concering the dam and the pumping of water that was taking place on February 26, the fact is that applicant's then vice president prevailed on Mr. Hall to take the necessary steps to stop the pumping, thereby insuring the abatement and eventual termination of the closure order. In addition, one may infer that from a practical and realistic point of view, this act on the part of a Consol official precluded the future pumping of water in such a manner which undoubtedly would again expose the mine to another possible closure order. Thus, on the facts here presented, while applicant may be correct when it argues that it has no legal responsibility to insure against future pumping of the water in the manner in which it was being pumped on February 26, it seems clear to me that Mr. Hall would not want to again place himself in a similar position of defying or ignoring the pleas of his own employer to cease and desist from any future course of actions which would inevitably lead to another mine closure order and loss of production, irrespective of the fact that Consol may not have any legal obligations to intercede.

Although one may sympathize with Consol's predicament with respect to the abatement process, the fact is that on the facts of this case abatement was achieved through the direct intervention of Consol and that fact should be appreciated and recognized by all concerned. This is particularly true in this case where it seems clear that while the dam in question has for many years been a source of potential threats, not only to the miners and a community hall downstream, but to all of the inhabitants of the Four States Community, no one has taken any direct action to conduct stability studies and to take the necessary construction corrective action to insure against the loss of property and lives in the event of a dam failure. It also seems clear, and MSHA concedes, that the imminent danger resulted from no fault on the part of applicant, and MSHA should seriously consider this fact if it is contemplating filing a separate civil penalty proceeding seeking an assessment against Consol for the imminently dangerous conditions created by the dam on February 26. I take note of the fact that the language of section 107(a) with regard to the assessment of any civil penalty on the facts here presented suggests that the filing of any such act is discretionary or permissive rather than mandatory, and that considering the circumstances here presented, a civil penalty proceeding may be inequitable.

Conclusion

In view of the aforementioned findings and conclusions, and on the basis of the preponderance of the reliable and probative evidence adduced in this proceeding, I find and conclude that the conditions described in the order of withdrawal constituted an imminent danger and that the order was issued. The evidence of record supports the judgment of the inspectors that the conditions they found on the day in question presented a situation that could reasonably be expected to result in death or serious injury to the miners in the Four States No. 20 Mine before the conditions could be abated and that normal mining operations could not continue or proceed until those conditions were abated.

Order

Order of Withdrawal No. 814153 issued February 26, 1979, is AFFIRMED and this proceeding is DISMISSED.

George A. Koutras
George A. Koutras
Administrative Law Judge

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Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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JAN 23 1980

RAVEN MINING COMPANY,
Contestant
v.
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent
UNITED MINE WORKERS OF AMERICA,
(UMWA),
Respondent

Contest of Citation and Order
Docket No. NORT 79-78
Order No. 0678141
January 22, 1979
Citation No. 035139
January 8, 1979
No. 1 Mine

DECISION

Appearances: J. Perry Dotson, Esq., Norton, Virginia, for the contestant; Leo McGinn, Trial Attorney, U.S. Department of Labor, Arlington, Virginia, for the respondent MSHA.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a contest filed by Raven Mining Company on March 2, 1979, challenging the legality of the issuance of the captioned citation and order. The notice of contest is in the form of a letter dated February 8, 1979, from contestant's attorney, challenging the fact of violation and requesting a hearing on the closure order for the purpose of "determining damages sustained" by Raven Mining Company.

Respondent MSHA filed an answer on March 28, 1979, and asserted that the order was properly issued after contestant failed to take reasonable steps to abate the citation after an extension of the original time for abatement had been granted by the inspector who issued the citation. By notice of hearing issued on July 11, 1979, the matter was scheduled for hearing in Bristol, Virginia, September 11, 1979. Thereafter, on August 23, 1979, MSHA filed a motion to dismiss on the ground that the Act does not provide a remedy for recovery of "damages" sustained by a mine operator as a result of a closure order, and that a final order assessing a civil penalty in the amount of $160 for the violation in question was entered on May 23, 1979, and upon subsequent non-payment, was forwarded to the Department of Justice for collection on July 12, 1979. The collection procedure initiated by MSHA pursuant to 30 CFR 100.5 and 100.6, resulted from contestant's failure to respond to the initial notice of assessment issued by MSHA. Since MSHA's motion to dismiss was filed well after the notice of hearing, no ruling was made and the parties were directed to appear at the hearing and MSHA was afforded an opportunity to be heard on its motion. A hearing was conducted on the merits of the withdrawal order and the parties were afforded a full opportunity to be heard on all issues presented in the proceeding. The parties were afforded an opportunity to file posthearing briefs but declined to do so.

Issues Presented

1. Whether the final disposition of the civil penalty proceeding pursuant to Part 100, Title 30, Code of Federal Regulations, which resulted from contestant's failure to timely challenge the issuance of the citation, precluded contestant from challenging the propriety and legality of the closure order which resulted from the failure to abate the citation within the time fixed by the inspector.

2. Whether the time fixed for abatement of the citation was reasonable and whether the closure order was properly issued.

Applicable Statutory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*.

2. Sections 104(a) and (b) of the Act, which states as follows:

> (a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.
>
> (b) If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within

> the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

DISCUSSION

Background of the Controversy

On January 8, 1979, at approximately 9:45 a.m., MSHA inspector Joseph Tankersley issued Citation No. 035139 pursuant to section 104(a) of the Act charging a violation of 30 CFR 75.1713-2. He fixed the abatement time as 9 a.m., January 12, 1979, and the citation stated as follows: "A communications system was not provided at the mine where the nearest point of medical assistance in case of an emergency could be contacted. (The phone company had removed the phone from mine property)."

On January 12, 1979, the inspector extended the abatement time to January 19, 1979, and the reason given for the extension was stated as follows: "The mine foreman stated that the operator contacted the phone company, and they are going to install the phone as they could get to it. More time is needed for the telephone company to install the telephone."

On January 22, 1979, the inspector issued a section 104(b) order of withdrawal and the basis for this action is shown on the face of the order as follows: "A communication system has not been provided at the mine where medical assistance could be contacted in the event of an emergency."

The inspector modified the withdrawal order on January 23, 1979, to show that the entire mine and surface work areas were closed. He further modified the closure order on January 24, 1979, to allow mine operations to continue, and the reasons for this action are shown on the face of the modification order as follows: "This is a modification allowing the operator to resume operations due to the fact that Moss 3-A Mine, Clinchfield Coal Company is readily available (estimated five (5) minutes travel) and the operator is installing communications to the Moss 3-A Mine. Moss 3-A personnel have agreed to the communication system."

The order was subsequently terminated on January 26, 1979, after abatement of the cited conditions and after telephone communications were established between the Raven Mine and the Clinchfield Mine, and Clinchfield agreed to supply emergency ambulance service. The telephone communications between the two mines is the system presently in use and MSHA has now accepted this arrangement as compliance with the requirements of section 75.1713-2 (Tr. 78-84).

Testimony and Evidence Adduced by MSHA

MSHA inspector Joseph R. Tankersley testified that he issued the citation and order in question, and he identified copies of the citation, order, the modification of the order, and the termination of the order (Exhs. G-4 through G-6). During his January 8th inspection, he noticed that the telephone which had been installed for emergency communication had been removed from the mine. Based on conversations with the mine foreman, he ascertained that the telephone was removed by the phone company for failure to pay delinquent bills. The phone jack was still on the wall of the mine office and he had observed the telephone during previous mine inspections. The phone was installed to comply with section 75.1713-2, and mine president James C. Scarborough, had previously submitted a letter to the MSHA district manager advising that the emergency communication system would be by telephone. The letter stated that the operator would contact the Dante Clinic by telephone in emergency cases (Tr. 37). Inspector Tankersley explained the requirement of the standard to the foreman, and when asked whether a CB radio was acceptable to meet the requirements of section 75.1713-2, he advised him that it was. However, a CB radio was not located on mine property during the January 8th inspection. The CB radio was kept in the mine foreman's personal vehicle which was being used by his wife on that day, and anytime miners or their wives used the vehicles, the CB's would be off mine property. When he inspected the mine on January 8, 1979, there was no automobile or CB radio on mine property, and there was no other form of communications available.

Inspector Tankersley testified that he fixed January 19 as the abatement time, but could not return to the mine until January 22, at which time he found that the mine phone had not been reinstalled because of non-payment of back bills. He modified his order on January 24, because Mr. Scarborough spoke with MSHA's subdistrict manager about providing an alternate communication system whereby Mr. Scarborough and the district manager agreed that a telephone line would be extended to the Clinchfield Mine, approximately 300 yards away, and Clinchfield Coal Company agreed to provide the Raven Mine with emergency ambulance service. Upon the subsequent installation of the telphone on January 26, he terminated the withdrawal order. Although he modified and terminated the withdrawal order, Mr. Tankersley did not believe that the contestant acted in a reasonable manner in abating the citation and withdrawal order because non-payment of bills is not a valid reason. The first time contestant attempted to negotiate with Clinchfield about a telephone line was January 24, 1979, and prior to this time contestant refused to pay the delinquent telephone bills, but the telephone was subsequently reinstalled at the mine (Tr. 33-43).

On cross-examination, Inspector Tankersley testified that section 75.1713-2 permits the use several means of communications, such as a phone, CB, vehicle radio phone, or "any other means of prompt communcation to the nearest point of medical assistance." He stated that "any other means of prompt communication" means some kind of positive communication between the medical facility and the mine, and it does not mean face-to-face vocal communication. He would not accept as compliance Mr. Scarborough running to the Clinchfield Mine to seek ambulance assistance in the event of an accident. Although the Dante Clinic is some 5 miles, or 20 minutes, from the mine, whereas the Clinchfield Mine is 5 minutes away and has an ambulance available, Clinchfield does not have the medical personnel as does the clinic, and the intent of section 75.1713-2 is to provide medical service. Further, even though Mr. Scarborough is a lessee of Clinchfield, it is debatable whether Clinchfield would render assistance (Tr. 43-47). At the time the telephone line to Clinchfield was being installed on January 25, a CB system would have sufficed as long as there were someone present all the time to answer it. He did not believe that someone running to Clinchfield would satisfy the requirement of promptness (Tr. 48). There have been no medical emergencies at the mine (Tr. 48).

Responding to a question about section 75.1713-1, Mr. Tankersley testified that it requires the mine operator to advise the district manager of the type of communication plan used at the mine so the district manager can determine whether it complies with the standard, and if there are changes, the operator is required to notify the district manager within 10 days. Section 75.1713-2 allows the operator to determine whether or not the change in communication complies with the requirements (Tr. 49).

On redirect examination, Inspector Tankersley testified that the "Paul Revere" type of communication, as opposed to the telephone line to the Clinchfield Mine, is not satisfactory because the 300 yard distance by foot is not easily traveled or accessible during snow or rainy weather. If an accident occurs on mine property, the operator is required to maintain a permanent telephone number for the emergency medical facilities posted (Tr. 50).

On recross-examination, Mr. Tankersley testified that the Clinchfield Moss 3A Mine is 300 yards higher on the mountain than the Raven mine, and the mines are connected by a haulage road. Miners frequently use a vehicle in traveling on the haulage road to and from both mines (Tr. 51-52). Responding to a bench question about whether he was aware of the existence of an alternate means of communication when he issued the citation on January 9, 1979, Inspector Tankersley stated that he was not (Tr. 55). Calls from the mine to the Dante Clinic were not made by CB radio, and the reason for issuing the citation was that he observed no telephone at the mine (Tr. 57).

On redirect examination, Inspector Tankersley testified that if the telephone had been replaced in the mine office by a CB radio, he would not have issued a citation, and had he observed any telephone communication between the two mines, he would have contacted personnel at the other mine to ascertain whether this arrangement was acceptable (Tr. 58).

On recross-examination, Inspector Tankersley testified that he does not inspect any mines that are using CB radios. In Kentucky, MSHA inspectors have accepted CB radios under section 75.1713-1 only if they are installed in the mine office, but a CB radio installed in a vehicle which is not on mine property at all times does not comply with section 75.1713-1 (Tr. 59).

Contestant's Testimony

James C. Scarborough, President of Raven Mining Company, testified that he probably wrote up a communication plan, but when he first started operations, he could not obtain telephones. In view of the fact that the C & P Telephone Company was slow in installing telephones, he installed a telephone line down the hill to the Clinchfield Mine and used that system as a mine telephone. Although Mr. Tankersley did not inspect the mine at that time, another inspector did and and he accepted the system. On January 8, the mine used a CB radio instead of a telephone, because the existing line to Clinchfield was broken by a truck. When the CB was being used he did not advise MSHA of the change because he was not aware that he had to, and he spoke to no inspector about it (Tr. 62). He could not recall whether the phone was out or in and indicated that he was experiencing difficulties in maintaining the phone in working order when it rained and that the phone company could not maintain it in operating order (Tr. 63).

Mr. Scarborough testified that his CB arrangements entailed arrangements with a Mr. Darrel Duty, who is home all the time working with CB's. In the event of the need for medical assistance, a call would be made to Mr. Duty from a CB in three trucks at the mine and he in turn would call the Coeburn Rescue Squad which was an hours drive away. There was no CB in the mine office. This plan never included the Dante Clinic, and Mr. Scarborough stated he did not know that the Dante Clinic had an ambulance service. This arrangement was the mine plan which was filed with MSHA in addition to the plan to run to the adjacent clinchfield mine to summon their ambulance in the event of an emergency. He then stated that the CB plan was not filed with MSHA's district manager, but that it was in use at the mine. The district manager was also not informed about the arrangements to use Clinchfield's ambulance, but frequent trips are made to that mine either by automobile over the road or on foot. In addition, he can yell down to the mine and can be heard. He has never discussed this plan with Inspector Tankersley (Tr. 63-68).

Mr. Scarborough stated that under his interpretation of section 75.1713-2, he can "holler at somebody and get communication, it's just as well as talking to somebody on the telephone." He was not at the mine when the inspector was there on January 8, but he set up a CB radio after that time and his employee assured him from that day on that the three vehicles with CB's would be at the mine at all times. He learned from his employee that when the inspector returned to the mine, he refused an offer to call Mr. Duty on the CB and issued his closure order (Tr. 69).

Mr. Scarborough stated that he is not protesting the fact that the inspector issued a citation on January 8 after he observed that there was no phone in the mine office. His protest is of the closure order after he established CB communication and the procedure for running to the Clinchfield mine for assistance (Tr. 77).

On cross-examination, Mr. Scarborough testified that he did not know when the telephone was removed from the mine office, nor he know whether the foreman's truck with the CB radio was off mine property. Although he did not see or talk to Inspector Tankersley, he testified that Mr. Tankersley returned to the mine on January 12, the date on which the citation was scheduled to be terminated, and he spoke with foreman Gary Johnson, and granted an extension for abatement until January 19. He further testified that he did not see or talk to Inspector Tankersley during the citation closure stage, and Mr. Johnson informed him about the CB arrangements with Mr. Duty, but that he personally has never met Mr. Duty (Tr. 91-93). Although the mine was operating under two shifts when the citation was issued, all three employees with the CB's in their trucks were on mine property at all times even though they worked only one shift. Now that the mine is operating under one shift, all three employees are present (Tr. 94).

Responding to a question about the reinstallation of the telephone system between his mine and the Clinchfield Mine, Mr. Scarborough testified that he authorized the issuance of a telephone order on January 22, 1979. Although Inspector Tankersley granted respondent 3 days beyond the extension to January 22, he testified that it was unreasonable for him for not trying out the CB radio. If all three employees were there, a CB radio was guaranteed to be there. Foreman Gary Johnson has never been absent since the mine has been in operation, and Mr. Johnson told him that Inspector Tankersley was mistaken about the CB radio truck being taken away by his wife on January 8, 1979 (Tr. 96).

Findings and Conclusions

Reviewability of the Closure Order

During the hearing, MSHA reasserted its view that the contest should be dismissed because the pleadings filed by the contestant indicated a desire by contestant to be heard on the limited question of "damages" sustained by the closure order. Since the Act does not provide for monetary damages, and since a final default order assessing a civil penalty in the amount of $160 for the citation in question was entered on May 23, 1979, and forwarded to the Justice Department for collection on July 12, 1979, MSHA argues that the operator's opportunity for affirmatively pleading economic loss as a mitigating factor in the amount of any penalty assessed is irrevocably lost (Tr. 8-10; MSHA's Motion to Dismiss, filed August 23, 1979).

Contestant argued that its intent in filing its initial notice of contest on February 8, 1979, was to challenge both the fact of violation and the subsequent withdrawal order which issued. Contestant maintained that it should be given the opportunity to establish and prove its contention that at the time the citation issued, contestant did in fact have a communications system in effect at the mine which met the requirements of section 75.1713-2, that the issuance of the citation and the order were arbitrary, and that contestant should be entitled to present its case so as to avail itself of all available administrative, as well as economic remedies to which it is entitled under the Act (Tr. 12-14).

It would appear from the record in this case that no formal civil penalty proceeding has ever been filed by MSHA with the Commission, and this resulted from the fact that the contestant did not contest the initial proposed penalty issued by MSHA pursuant to 30 CFR 100.5 and 100.6, and the matter culminated in a default order being forwarded to the Department of Justice for collection of the $160 assessment for Citation No. 035139. Under the circumstances, I agree with MSHA's assertion that contestant is foreclosed from pleading any off-set resulting from the closure order in its current contest. However, it seems clear that in a civil penalty proceeding, the validity of the order is not in issue, and withdrawal orders are not subject to vacation, Buffalo Mining Company, 2 IBMA 327 (1973); Plateau Mining Company, 2 IBMA 303 (1973); Ashland Mining Company, 5 IBMA 259 (1975); Jewell Ridge Coal Company, 3 IBMA 376 (1974). The usual method for an operator to contest the propriety and legality of a withdrawal order is to seek review pursuant to section 105(d) of the Act, and the fact that the conditions cited have been abated and the order terminated does not warrant dismissal of the contest, Zeigler Coal Company, 1 IBMA 72 (1971). On the facts and circumstances presented in this proceeding, I conclude that contestant is entitled to an independent review of the validity and propriety of the closure order issued pursuant to section 104(b) of the Act, notwithstanding the fact that it did not contest the initial proposed civil penalty assessment. Under the circumstances, MSHA's narrow and restrictive reading of the notice of contest filed in this case is rejected and its motion to dismiss is DENIED. I conclude that contestant has a right to seek review of the reasonableness of the abatement time, and coupled with the fact that it may be liable to compensate miners under section 111 of the Act for the period of time the mine was closed as a result of that order, it is is entitled to its day in court, and MSHA conceded as much during oral argument (Tr. 20-23, 26). Although it is true the notice of contest filed by the contestant on February 8, 1979, makes reference to a desire for a hearing "to determine damages" sustained by the contestant as a result of the closure order, I believe that the pleadings should be broadly construed so as to protect not only the rights of miners, but mine operators as well.

Reasonableness of the Abatement Time

The underlying citation issued in this case charges the contestant with a violation of 30 CFR 75.1713-2, which provides as follows:

> (a) Each operator of an underground coal mine shall establish and maintain a communication system from the mine to the nearest point of medical assistance for use in an emergency.

> (b) The emergency communication system required to be maintained under paragraph (a) of this § 75.1713-2 may be established by telephone or radio transmission or by any other means of prompt communicationi to any facility (for example, the local sheriff, the State highway patrol, or local hospital) which has available the means of communication with the person or persons providing emergency medical assistance or transportation in accordance with the provisions of § 75.1713-1.

The citation was initially issued on January 8, 1979, and the original abatement time was fixed as January 12, 1979, and subsequently extended to January 19, 1979. The inspector did not return to the mine until January 22, 1979, and at that time made the determination that abatement had not been achieved and that the time should not be further extended. Under the circumstances, he then proceeded to issue his withdrawal order, and the issue presented is whether the inspector acted reasonably in light of all of the prevailing circumstances. In this regard, it seems clear that where an inspector finds that a violation has not been abated within the initial or extended time fixed by him, he is authorized to either grant another extension or issue a withdrawal order. The inspector must act reasonably on the basis of the facts confronting him at that time, *United States Steel Corporation*, 7 IBMA 109 (1976), and it is an abuse of discretion to issue a withdrawal order if the circumstances show that the time for abatement should have been further extended, *Old Ben Coal Company*, 6 IBMA 294 (1976). The contestant has the burden of establishing that the inspector acted unreasonably in fixing or failing to extend the abatement time, *Freeman Coal Mining Corporation*, 1 IBMA 1 (1970).

It seems clear from the record in this proceeding that the inspector issued the initial citation when he failed to find a telephone installed in the mine office. Although he observed a phone jack, the telephone was missing, and upon further inquiry he learned that the phone had been removed because of non-payment of past bills. Contestant has presented no evidence to dispute this fact, and Mr. Scarborough did not deny it. The inspector believed that a violation occurred because contestant failed to maintain its *telephone* communications between the mine and a local clinic, and this arrangement was the only one on file with the local MSHA district office. Further, during the course of oral argument at the hearing, contestant indicated that it was not challenging the initial citation issued by the inspector as a result of his failure to find a telephone installed in the mine office (Tr. 76). Contestant's defense to the *order* is based on the assertion that *subsequent* to the issuance of the citation, contestant did in fact establish a communications system which complied with section 75.1713-2, when it instituted a procedure for voice of foot communications with the adjacent Clinchfield Mine and a system for use of CB radios mounted on vehicles which were on mine property. In these circumstances, contestant argued that it was in compliance at the time the order issued and that the inspector acted arbitrarily and unreasonably in failing to accept these procedures as compliance and in issuing his closure order (Tr. 75-80).

Although Mr. Scarborough alluded to the fact that he had somehow changed his communication plan which had been filed with MSHA, and intimated that MSHA had accepted something less than telephone communications, it seems clear from the abatement and the testimony presented by both Mr. Scarborough and the inspector, that abatement was achieved by the installation of a phone line between the Raven Mine and Clinchfield Mine so that emergency ambulance service could be provided, and that MSHA will not accept CB communications mounted in a mine vehicle or voice and/or foot communication as compliance (Tr. 79-85). It is also clear to me that contestant's attempts at compliance by utilizing means other than a telephone system took place during the abatement period (Tr. 89). Mr. Scarborough was not at the mine when the withdrawal order was issued on January 22, and he believed the inspector acted unreasonably by not trying out the CB radio arrangements (Tr. 95). Aside from the fact that it can be argued that contestant has waived its right to contest the fact of violation by not contesting the original civil penalty assessment and permitted that assessment to ripen into a default judgment, the facts and evidence adduced at the hearing in this contest proceeding supports a finding of a violation of the cited standard. It seems clear from the record that at the time the citation issued, contestant was not in compliance with section 75.1713-2, because it did not have the required operative telephone communications arrangements with respect to emergency medical assistance.

With respect to the reasonableness of the abatement time, I find and conclude that the record establishes that the inspector acted in more than a reasonable fashion in fixing the initial abatement time, as well as in the exercise of his discretion in not extending the abatement time any further. On the basis of the evidence adduced here, it seems clear to me that contestant's failure to maintain the required emergency telephone communications stems from the fact that contestant failed to pay its past due telephone bills. That is a matter solely within the contestant's control, and I can find no mitigating circumstances presented which detracts from that fact. The initial abatement time was more than ample for contestant to resolve the matter with the phone company. As a matter of fact, contestant was gratuitously given an additional period for compliance from January 19 to January 22. However, on the basis of the record here presented that time was apparently spent by contestant in an effort to convince MSHA that his alternative communications efforts were in compliance rather than to comply with the citation and timely reinstall the phone. Considering the totality of the circumstances presented, I conclude and find that the time fixed for abatement was reasonable and that the inspector was not arbitrary in failing to extend the abatement time further. The order is AFFIRMED.

ORDER

In view of the foregoing findings and conclusions, Citation No. 035139, issued January 8, 1979, and Order of Withdrawal No. 0678141, issued January 22, 1979, are AFFIRMED, and contestant's request for any relief with respect to the issuance of the citation and order pursuant to the Act is DENIED and this contest is DISMISSED.

George A. Koutras

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 24 1980

SECRETARY OF LABOR,	Complaints of Discharge,
MINE SAFETY AND HEALTH	Discrimination, or Interference
ADMINISTRATION (MSHA),	
on behalf of	Docket No. KENT 80-22-D
ANTHONY E. HERIGES,	CD 79-103
Applicant	
v.	Docket No. KENT 80-23-D
	CD 79-113
ISLAND CREEK COAL COMPANY,	
Respondent	Hamilton No. 2 Mine
	Morganfield, Kentucky
SECRETARY OF LABOR,	
MINE SAFETY AND HEALTH	
ADMINISTRATION (MSHA),	
on behalf of	
TOM ANTONINI,	
Applicant	Docket No. KENT 80-15-D
v.	CD 79-133
ISLAND CREEK COAL COMPANY,	Docket No. KENT 80-14-D
Respondent	CD 79-97
	Hamilton No. 1 Mine
	Madisonville, Kentucky
SECRETARY OF LABOR,	
MINE SAFETY AND HEALTH	
ADMINISTRATION (MSHA),	
on behalf of	
JOHNNY GIBSON,	
Applicant	Docket No. KENT 80-42-D
v.	CD 79-198
	No. 9 Mine
ISLAND CREEK COAL COMPANY,	
Respondent	
SECRETARY OF LABOR,	
MINE SAFETY AND HEALTH	
ADMINISTRATION (MSHA),	
on behalf of LARRY HALEY,	
Applicant	Docket No. KENT 80-52-D
v.	CD 79-199

ISLAND CREEK COAL COMPANY, :
Respondent : No. 9 Mine
:

ORDER OF DISMISSAL

The Secretary filed his response to my December 20, 1979 and January 3, 1980 Orders to Show Cause why the above cases should not be dismissed in light of the Commission's decision in Secretary of Labor, Mine Safety and Health Administration (MSHA) v. The Helen Mining Co., Docket No. PITT 79-11P, 1 FMSHRC Decs. 1796 (1979), appeal docketed, No. 79-2537 (D.C. Cir. Dec. 21, 1979).

Most of the Secretary's arguments are directed to the soundness of the Commission's reasoning in Helen Mining. I have no power to disturb that decision. Thus, the Secretary must demonstrate that the facts of these cases are sufficiently distinguishable from those in Helen Mining that the latter case is not controlling. The Secretary argues that:

> "Helen Mining, supra, specifically addresses the spot inspection required by § 103(i) of the Act. This section requires the Secretary by his authorized representative to conduct spot inspections at irregular intervals where the mine to be inspected is found to liberate a given quantity of methane gas. Only Tom Antonini, Docket No. KENT 80-15-D, CD 79-133, is a true 103(i) inspection matter. The other cases under consideration involve spot inspection of a different nature than the type contemplated by Helen Mining, supra. Consequently, Helen Mining, supra, should not constitute precedent which would cause a dismissal of the complaints of discrimination." Secretary's Response at 10.

I do not find this argument to be convincing. In Helen Mining, the Commission stated the issue as "whether a mine operator must pay a miners' representative for the time he spends accompanying a mine inspector during a 'spot' inspection required by section 103(i) of the Federal Mine Safety and Health Act of 1977 * * *" 1 FMSHRC Dec. 1796. The Commission's analysis of the statutory language and legislative history of the Act clearly indicates that the decision was not intended to be so limited. The following statement of Congressman Perkins, made during an oral report to the House on the results of the conference committee's deliberations, was relied on by the Commission in Helen:

> "* * * [I]t is the intent of the committee to require an opportunity to accompany the inspector at no loss of pay only for the regular inspections mandated by subsection (a), and not for the additional inspections otherwise required or permitted by the act. Beyond these requirements regarding no loss of pay, a representative authorized by the miners shall be entitled to accompany inspectors during any other inspection exclusive of the responsibility for payment by the operator." 1 FMSHRC Decs at 1804 quoting Legislative History of the Federal Mine Safety and Health Act of 1977 at 1358.

This evidence of legislative intent is equally dispositive of the issue presented here. Furthermore, after the Commission's decision in *Helen Mining*, it again relied upon Congressman Perkins' remarks in holding that a miners' representative was not entitled to walkaround pay for the time spent accompanying an inspector during a special electrical inspection. *Kentland-Elkhorn Coal Corporation v. Secretary of Labor, Mine Safety and Health Administration (MSHA), and United Mine Workers of America*, Docket No. PIKE 78-399, 1 FMSHRC Decs. 1833 (1979), *appeal docketed*, No. 79-2536 (D.C. Cir. Dec. 21, 1979).

ORDER

The cases are DISMISSED without prejudice.

Edwin S. Bernstein
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 24 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner
v.

SEWELL COAL COMPANY,
Respondent

Civil Penalty Proceeding

Docket No. WEVA 79-293
A.O. No. 46-03859-03029

Sewell No. 1A Mine

DECISION

Pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), the Secretary of Labor petitioned for the assessment of a civil penalty. Petitioner alleged that Respondent violated the mandatory safety standard at 30 CFR 75.1403-6(b)(3). That standard provides that: "[E]ach track-mounted self-propelled personnel carrier should: * * * [b]e equipped with properly installed and well-maintained sanding devices, except that personnel carriers (jitneys), which transport not more than 5 men, need not be equipped with such sanding device * * *."

A hearing was held on December 17, 1979, in Charleston, West Virginia. The issues are whether Respondent violated the standard and, if so, the appropriate civil penalty to be assessed, based upon the six criteria in Section 110(i) of the Act. At the hearing, Homer S. Grose, the MSHA inspector who issued the citation, testified for Petitioner and Paul E. Given, Respondent's safety director, testified for Respondent.

The parties stipulated, and I find, that:

1. I have jurisdiction over this proceeding, and Respondent is within the jurisdiction of the Act.

2. Respondent is a large operator and payment of an appropriate civil penalty will not affect its ability to continue in business.

3. Respondent was duly served with the citation and its termination notice.

4. Respondent exercised ordinary good faith in abating the conditions giving rise to the citation.

5. In the 24-month period immediately preceding the issuance of the citation, 452 alleged violations were assessed against Respondent, covering a total of 242 inspection days. This information was derived from an MSHA computer history printout.

6. Between 30 and 40 of these alleged violations involved 30 CFR 75.1403-6(b)(3), the standard involved in this case. By entering into this stipulation, Respondent does not concede that these citations actually represent violations of the cited standard.

7. All exhibits are authentic and may be admitted into evidence on that basis, subject to possible objections as to their relevancy.

Mr. Grose was the only witness present at the time of the alleged violation. His testimony was uncontradicted. He stated that at approximately 8 a.m. on January 18, 1979, he observed a self-propelled, track-mounted personnel carrier emerge from Respondent's No. 1A Mine and discharge miners who had worked the night shift. The vehicle, which was capable of carrying approximately eight men, was equipped with devices which apply sand onto the tracks in front of the vehicle's metal wheels. The purpose of the sand is to increase traction and allow for better control of the vehicle. There is one sand tube in front of each of the four wheels.

At about 8 a.m., Mr. Grose observed Respondent's representative, Robert Neal, check the personnel carrier. After Mr. Neal had completed his inspection, Mr. Grose inspected the carrier. He found that two of the four sand hoses were clogged and therefore inoperative. Based upon this, he issued the citation. The hoses were cleared within 15 minutes of the issuance of the citation.

The sand hoses are approximately an inch and a half in diameter and can become clogged if the sand becomes damp or moist. They can be unclogged by inserting a rod or similar object into them and removing the damp sand. On January 18, 1979, there was no moisture on the mine's surface but there was dampness in the low-lying areas within the mine. Mr. Grose stated, and I find, that the mine contained steep grades and narrow areas which had little clearance and no shelter holes. Therefore, if a personnel carrier lost control, it could cause a dangerous accident.

The Secretary of Labor issued a safeguard notice with regard to this type of violation to Respondent in January 1978. During January 1979, there were nine other citations issued to Respondent for violations of this standard. Mr. Grose testified that violations of 30 CFR 75.1403-6(b)(3) occurred quite frequently at this mine.

Mr. Given did not know the facts surrounding the alleged violation. He was not present at the site on January 18, 1979, but he testified that the mine had a policy of attempting to comply with all personnel carrier standards and had issued instructions and posted notices to encourage compliance. He stated that there had never been an accident in this mine or any other Sewell mine as a result of a violation of this standard.

The parties waived submission of briefs. Based upon the evidence, I make the following conclusions of law and order:

Occurrence of Violation: The evidence is undisputed that on the date, time, and at the place alleged in the citation, the vehicle in question had only two of its four sanding devices in operating condition. The vehicle transported more than five men. Therefore, Respondent violated the standard at 30 CFR 75.1403-6(b)(3).

Gravity of Violation: I agree with Petitioner that this is a serious violation. Despite Respondent's arguments that the vehicle was equipped with brakes to impede its descent, the sanding devices were designed to prevent the vehicle from losing control and to increase traction between the vehicle's wheels and the tracks. I find that the devices were necessary for the vehicle's safe operation. At the time that the citation was issued, the vehicle in question was about to carry seven men down into the mine. The grades in the No. 1A Mine were fairly steep and areas near the vehicle's track had narrow clearances and no shelter holes. Therefore, if the vehicle lost control it is quite likely that serious injury or death would result.

Negligence: The parties stipulated that the operator was cited for between 30 and 40 violations of this safety standard during the 24-month period preceding this incident. During January 1979, the operator was served with nine citations for violation of this standard. The inspection of the vehicle made by Mr. Neal was inadequate, as he did not notice the inoperative sanding devices. This indicates negligence on the part of the Respondent.

Good Faith Efforts to Achieve Rapid Compliance: As stipulated, the operator acted in good faith in correcting this violation. The evidence showed that this was done within about 15 minutes.

Size of Operator's Business and Effect of Penalty on Operator's Ability to Continue in Business: The parties stipulated, and I find, that Respondent is a large operator and that the proposed penalty would have no effect upon its ability to continue in business.

History of Previous Violations: There were 452 previous violations by the operator during the 24-month period preceding this incident, covering 242 man-days of inspections.

Assessment of Penalty: The Assessment Office recommended a penalty of $295. Counsel for the Secretary contended that that amount is too small in view of the gravity of the violation and Respondent's high degree of negligence. I agree. I am impressed with the large number of violations of this safety standard committed by this operator. I think the recommended penalty is insufficient to motivate the operator to comply with this standard. A larger penalty is required to impress upon Respondent the seriousness of this type of violation and encourage future voluntary compliance. Therefore, I assess a penalty of $1,000.

ORDER

Respondent is ORDERED to pay $1,000 in penalties within 30 days of the date of this Order.

Edwin S. Bernstein

Edwin S. Bernstein
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 28 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. TRIPLE S COAL COMPANY, Respondent	Civil Penalty Proceeding Docket No. PIKE 79-7-P A.C. No. 15-09867-03001 Mine No. 1
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. BELINDA COAL COMPANY, Respondent	Docket No. PIKE 79-24-P A.C. No. 15-03785-03001 Mine No. 1

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Gary Stiltner, Ash Camp, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to written notice dated April 12, 1979, as amended May 7, 1979, a hearing in the above-entitled consolidated proceeding was held on May 17, 1979, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

MSHA's Petition for Assessment of Civil Penalty in Docket No. PIKE 79-7-P was filed on October 16, 1978, seeking to have a civil penalty assessed for an alleged violation of 30 CFR 75.1204 by Triple S Coal Company. The Petition for Assessment of Civil Penalty in Docket No. PIKE 79-24-P was filed on November 15, 1978, seeking to have a civil penalty assessed for an alleged violation of 30 CFR 75.1204 by Belinda Coal Company.

Issues

The issues raised by the Petitions for Assessment of Civil Penalty are whether violations of the mandatory health and safety standards occurred and, if so, what monetary penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. Respondents' sole defense in their answers to the Petitions for Assessment of Civil Penalty and in the testimony of their witness at the hearing is that no violations of section 75.1204 occurred. Therefore, the first question to be determined in this proceeding is that of whether either respondent violated section 75.1204.

Docket No. PIKE 79-7-P

Notice No. 2 TLA (7-3) 12/13/77 § 75.1204 (Exhibit 5)

Findings. Section 75.1204, to the extent here pertinent, provides that when an operator permanently abandons a coal mine, he shall within 60 days after such abandonment file with the Secretary a copy of the mine map revised and supplemented to the date of abandonment or closure. Respondent Triple S Coal Company abandoned its No. 1 Mine in March or May 1977 and, within 2 weeks after such abandonment, one of its copartners personally took copies of the final map to MSHA's Pikeville Office and gave them to an inspector named Doug Fleming who gave the copartner no receipt showing that the final map had been submitted (Tr. 41).

When Triple S Coal Company received Notice No. 2 TLA alleging that the final map had not been submitted, the copartner who had delivered the map to Mr. Fleming called MSHA's Pikeville Office. Someone in that office stated that there had been some confusion regarding the map and that the matter would be taken care of. The copartner subsequently examined his old records and found two additional copies of the final mine map which were sent to MSHA and received by the Pikeville Office on January 20, 1978 (Tr. 33-34).

MSHA presented two witnesses in support of Notice No. 2 TLA. The first witness was Mr. Thomas L. Adams who wrote the notice. Notice No. 2 TLA alleges that respondent did not submit a final map of its No. 1 Mine although the mine had been abandoned for more than 90 days. Mr. Adams testified that he issued Notice No. 2 TLA on the basis of information supplied to him by MSHA's Ventilation Department at the Pikeville Office, but Mr. Adams did not know the date on whch the No. 1 Mine had been abandoned. Mr. Adams visited the site of the No. 1 Mine on or about December 1, 1977, and again about a week later. Since he found no one on the mine property on either occasion, he concluded that the mine was abandoned at that time, but he did not know how long the mine had been abandoned before he issued Notice No. 2 TLA (Tr. 30-31).

MSHA's other witness was Mr. Elmer Fuller who wrote on February 7, 1978, a notice of termination of Notice No. 2 TLA after he had been given a copy of the final map showing that it had been received on January 20, 1978 (Tr. 34-36). Mr. Fleming, to whom respondent's copartner gave the final maps, was unable to attend the hearing to state whether or not he agreed that respondent's copartner had submitted the final map within 2 weeks after the mine was closed (Tr. 11).

Conclusions. In my notice of hearing issued in this proceeding, I referred to the fact that respondent's defense was that it had submitted the final maps as required by section 75.1204. My notice then stated that MSHA should try to present as a witness the person to whom respondent allegedly gave the maps so that he could state whether or not he agreed or disagreed with respondent's claim that the final map had been submitted. MSHA did not have that person present at the hearing and gave no reason for his unavailability as a witness other than indicating through Mr. Adams' testimony that Mr. Fleming "* * * was unable to attend this hearing this morning" (Tr. 11).

Since respondent's witness testified under oath that he submitted the final map within 2 weeks after Triple S Coal Company's No. 1 Mine was abandoned, his testimony is entitled to more weight than MSHA's testimony because neither of MSHA's witnesses had personally examined MSHA's files in order to determine for certain that no final map had been submitted (Tr. 31; 36). They based their allegations that the final map had not been submitted solely on a list of companies which had been given to them by their supervisor. That list included respondent's No. 1 Mine, but neither of MSHA's witnesses was able to rebut with any personal knowledge respondent's claim that the final map had been submitted (Tr. 31-38). MSHA's Pikeville Office no doubt processes a large number of filings. Even the most competent employees occasionally make mistakes. In the absence of some evidence showing that a mistake was not made in processing respondent's maps, I believe that respondent's claim that it submitted the required map should be upheld.

Inasmuch as MSHA's evidence fails to show that respondent's copartner incorrectly alleged that the final maps were submitted within 60 days after respondent's No. 1 Mine was abandoned, I find that no violation of section 75.1204 was proven as alleged by Notice No. 2 TLA dated December 13, 1977. Therefore, MSHA's Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-7-P will hereinafter be dismissed.

Docket No. PIKE 79-24-P

Notice No. 1 BHT (8-1) 1/30/78 § 75.1204 (Exhibit 2)

Findings. Notice No. 1 BHT alleged that respondent had violated section 75.1204 by failing to submit a final map for its No. 1 Mine which had been abandoned since June 23, 1975. Belinda Coal Company's witness agreed that the No. 1 Mine had been abandoned on June 23, 1975, but he insisted that he had personally, within 1 or 2 days after abandonment, submitted to Mr. Rick Keene in MSHA's Pikeville Office copies of the final map (Tr. 20; 27). Respondent's witness stated that he lives 30 miles from Pikeville and that it was his practice to come to Pikeville and fill out abandonment papers for both Federal and State agencies because "* * * I think practically everyone knows you have to have final maps before you can abandon mines" (Tr. 20).

MSHA's first witness in support of Notice No. 1 BHT was Mr. Billy H. Tackett. He stated that he had issued the notice after his supervisor gave him a "big list" of mines which had been abandoned without submission of final maps. Mr. Tackett did not check any files to determine whether Belinda

Coal Company had submitted a final map (Tr. 8). Another of MSHA's witnesses, Mr. Thomas Adams, testified that a final map was eventually submitted for Belinda's No. 1 Mine but that he did not know the date on which such a map was submitted (Tr. 13).

Conclusions. Apparently Mr. Adams was confused about the submission of a final map by Belinda in response to Notice No. 1 BHT because Belinda's witness stated that he never did submit a final map in response to Notice No. 1 BHT because he knew that he had already done so and that he had declined to do so after receiving Notice No. 1 BHT (Tr. 45). Nevertheless, Belinda's witness agreed at the hearing that he would submit a final map for a second time in order that MSHA's records could be completed with respect to Belinda's No. 1 Mine (Tr. 45).

MSHA's evidence in support of Notice No. 1 BHT was inadequate. Although MSHA did know when Belinda's No. 1 Mine had been abandoned, MSHA was unable to present as a witness Mr. Rick Keene or anyone else who had personal knowledge about Belinda's claim that copies of the final map had been submitted to Mr. Rick Keene 1/ (Tr. 10; 32; 36). MSHA's witnesses had not examined any files pertaining to Belinda Coal Company and could not personally state what specific information had been used to prepare the "big list" alleging that Belinda Coal Company had failed to submit a final map (Tr. 5-13).

Belinda's witness testified under oath that he had submitted the final map within 1 or 2 days after the No. 1 Mine had been abandoned and that he had done so because both MSHA and the State of Kentucky require that a final map be submitted at the time a mine is abandoned. The witness also recalled specifically that he had handed the final map to Mr. Rick Keene who then worked in the Ventilation Department in MSHA's Pikeville office (Tr. 19).

I cannot find that the testimony of MSHA's witnesses who possessed only a "big list" of abandoned mines prepared by other personnel in the Pikeville Office can be used to prove a violation of section 75.1204 when the company charged with such violation introduces the testimony of a credible witness to the effect that the final map was submitted within 60 days after abandonment as required by section 75.1204. I find that MSHA failed to prove that the violation of section 75.1204 alleged in Notice No. 1 BHT occurred. Therefore, I shall hereinafter dismiss MSHA's Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-24-P.

1/ Belinda's witness claimed that he had given the map to Mr. Keene in this instance, instead of to Mr. Fleming as was the case with respect to Triple S Coal Company, supra. Moreover, there is doubt in the record as to when Mr. Keene actually stopped working for MSHA because one witness testified that he left in late August or early September 1976, while another of MSHA's witnesses stated that Mr. Keene left on April 8, 1976 (Tr. 32; 36). Regardless of whether Mr. Keene left in April or September 1976, he would have been working in the Pikeville Office in 1975 at the time Belinda's witness claimed he gave the final map to Mr. Keene.

Ultimate Findings and Conclusions

For the reasons hereinbefore given, MSHA failed to prove that the violation of section 75.1204 alleged in Notice No. 2 TLA (7-3) dated December 13, 1977, and the violation of section 75.1204 alleged in Notice No. 1 BHT (8-1) dated January 30, 1978, occurred. Since no violations of the mandatory safety standards were proven, it is unnecessary for me to consider the six criteria under which civil penalties are assessed if violations are found to have occurred.

WHEREFORE, it is ordered:

MSHA's Petitions for Assessment of Civil Penalty filed in Docket Nos. PIKE 79-7-P and PIKE 79-24-P are dismissed for failure of MSHA to prove that the violations of section 75.1204 alleged therein actually occurred.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 28 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

PYRO MINING COMPANY,
Respondent

Civil Penalty Proceeding

Docket Nos.	Assessment Control Nos.
KENT 79-181	15-11702-03001
Pyro Central Shop	
KENT 79-182	15-10815-03010
Wheatcroft Mine	
KENT 79-183	15-02131-03020
Pyro Mine No. 2	
KENT 79-184	15-10353-03019V
KENT 79-185	15-10353-03020
KENT 79-186	15-10353-03021
Pyro Mine No. 6	
KENT 79-187	15-10339-03017
Pyro Mine No. 11	

DECISION APPROVING SETTLEMENT

Counsel for the Secretary of Labor filed on December 31, 1979, in the above-entitled proceeding a motion for approval of settlement. Under the settlement agreement, respondent would pay penalties totaling $8,378 instead of penalties totaling $9,505 as proposed by the Assessment Office. Respondent's motion was accompanied by a considerable number of documents to support the settlement agreement.

The motion for approval of settlement states that the parties considered the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. Three of those criteria may be given a generalized evaluation which will apply to all of the 40 violations alleged in MSHA's seven Petitions for Assessment of Civil Penalty, while the remaining three criteria will be considered on an individual basis when each of the alleged violations is hereinafter reviewed. The three criteria which may be given a general evaluation are the size of respondent's business, the question of whether payment of penalties would cause respondent to discontinue in business, and respondent's history of previous violations.

The orders of assessment prepared by the Assessment Office show that respondent's mines produce a total of 1,634,680 tons of coal per year, whereas an income statement submitted with the motion for approval of settlement shows that respondent sold a total of 1,228,353 tons of coal during the 12 months ending July 31, 1979. Since respondent's income statement provides data which are more current than the production figures in the assessment orders, I shall use the income statement for the purpose of determining the size of respondent's business. Assuming that respondent operated its mines for 250 days during the 12 months covered by its income statement, the average daily production would have been 4,912 tons per day. On the basis of those figures, I find that respondent is a large operator and that penalties in an upper range of magnitude should be assessed to the extent that they are determined under the criterion of the size of respondent's business.

The financial data submitted with the motion for approval of settlement show that respondent lost about $14.6 million during the 12 months ending July 31, 1979, of which an amount of at least $7 million is attributable to its coal operations. Respondent's quarterly report submitted to the Securities and Exchange Commission states that respondent is in violation of the debt and equity covenants under its financing agreements with both of its lenders, but that respondent hopes to avoid defaulting under its agreement by selling its Corinne gas field in Mississippi for $25,800,000 of which amount a sum of $20,000,000 is to be paid in cash. The financial data also show that respondent's net losses made it unnecessary for respondent to provide for payment of any Federal income taxes for the periods ending January 31, 1978, and January 31, 1979.

On the other hand, the motion for approval of settlement (p. 5) states that "[w]hile the agreed upon penalty will affect respondent's financial posture it will have no effect on respondent's ability to remain in business." Respondent's answers to MSHA's Petitions for Assessment of Civil Penalty indicate that respondent does not agree with the above-quoted statement in the motion for approval of settlement because respondent's answers claim that "civil penaties will substantially affect our ability to stay in business." Respondent's answers further allege that inflation, higher interest rates, and EPA restrictions, which required respondent to construct expensive cleaning plants which wash away 30 percent of the coal which respondent used to sell, all contribute to respondent's inability to make a profit on its coal operations.

It would appear that the financial data submitted by respondent would support a finding that payment of penalties might cause respondent to discontinue in business if it were not for the fact that one of the few optimistic statements in respondent's quarterly report to the SEC states as follows (p. 9):

> Coal revenues increased significantly principally due to a 31% increase in tons sold by the Registrant's Kentucky operation and the fact that a substantial portion of the sales

> were under higher-priced contracts. In addition, the Registrant's Alabama operation was shut down during a significant portion of the three months ended October 31, 1978 due to the erection of a large dragline on the property.

After considering all of the financial data submitted by respondent, I conclude that the payment of penalties will not cause respondent to discontinue in business.

The assessment orders in this proceeding assign anywhere from 0 points (Docket No. KENT 79-181) to 13 points (Docket No. KENT 79-187) for assessment of penalties under the criterion of history of previous violations. The data submitted in support of the motion for approval of settlement do not provide information which would permit me to find that the Assessment Office has attributed more penalty points to the criterion of history of previous violations than is warranted. In the absence of any facts to show that the Assessment Office has erred in its evaluation of the criterion of history of previous violations, I find that the Assessment Office has made reasonable conclusions with respect to the criterion of history of previous violations and no further effort to analyze the Assessment Office's determinations as to that criterion will be made.

The remaining three criteria, namely, respondent's negligence, if any, the gravity of the alleged violations, and respondent's good faith effort to achieve rapid compliance will hereinafter be individually considered in my review of the specific violations alleged in each docket.

Docket No. KENT 79-181

Citation No. 795149 alleged that respondent had violated section 77.1607(o) because a truck used during daylight hours was not provided with operative headlights. The Assessment Office considered that the violation involved no negligence, that it was moderately serious, and that there was a normal effort to achieve compliance. The Assessment Office proposed a penalty of $14 and respondent has agreed to pay the full proposed penalty. I find that the Assessment Office derived an appropriate penalty and that respondent's agreement to pay the full amount should be approved.

Citation No. 795152 alleged that respondent had violated section 77.410 because a truck had not been equipped with an adequate backup alarm. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent demonstrated normal good faith in achieving compliance. The Assessment Office proposed a penalty of $60. Respondent has agreed to pay the full proposed penalty. I find that the Assessment Office properly arrived at an appropriate penalty and that respondent's agreement to pay the full amount should be approved.

Docket No. KENT 79-182

Citation No. 795701 alleged that respondent had violated section 75.1100-1(e) because the fire extinguisher on a battery-powered locomotive did not contain expellant or powder. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent demonstrated a better than average good faith effort to achieve compliance. The Assessment Office proposed a penalty of $90 and respondent has agreed to pay a penalty of $65. The operator's evaluation sheet shows that the operator believed the alleged violation to be nonserious because the operator did not think that the violation would result in injury or that the conditions surrounding the violation would be likely to cause a fire. If a hearing had been held, questions would have been raised as to the degree of the operator's negligence and the gravity of the violation. In such circumstances, I find that respondent's agreement to pay a penalty of $65 is reasonable and should be approved.

Citation No. 795702 alleged that respondent had violated section 75.1100-2(d) by failing to equip a battery-powered personnel carrier with a fire extinguisher. The Assessment Office found that the violation involved ordinary negligence, that it was serious, and that respondent demonstrated a better than average effort to achieve compliance. The Assessment Office proposed a penalty of $98 and respondent has agreed to pay a penalty of $70. Respondent's evaluation sheet claims that respondent was nonnegligent because an unauthorized person had removed the fire extinguisher. Respondent did not believe that the conditions existing at the time the citation was written would produce a fire and doubted that any injury would occur as a result of the absence of the fire extinguisher. If a hearing had been held, questions would have been raised as to the degree of respondent's negligence and the gravity of the alleged violation. Therefore, respondent's agreement to pay a reduced penalty of $70 is approved.

Citation No. 795703 alleged that respondent had violated section 75.601-1 because the circuit breaker for the trailing cable to a roof-bolting machine was set 400 amps higher than it should have been. The Assessment Office considered the violation to involve ordinary negligence, that it was serious, and that respondent demonstrated a better than average effort to achieve compliance. The Assessment Office proposed a penalty of $98 and respondent has agreed to pay a penalty of $70. Respondent alleges that no overcurrent was present. In such circumstances, a question exists as to whether the Assessment Office may have assigned an excessive number of points to the criterion of gravity. I find that respondent's agreement to pay a penalty of $70 should be approved.

Citation No. 795704 alleged that respondent had violated section 75.1722(a) because the tramming chain and tramming sprockets on the feeder were not guarded. The Assessment Office believed that the violation involved ordinary negligence, that it was serious, and that respondent demonstrated a better than average effort to achieve compliance. Respondent has agreed to pay a penalty of $100, whereas the Assessment Office proposed a penalty of $130. There are remarks on the inspector's statement indicating that the feeder only moves when the conveyor belt is being extended and that no more than one person would be likely to be injured by an unguarded tramming chain. I find that a question exists as to whether the Assessment Office assigned an excessive number of points under the criteria of negligence and gravity and that respondent's agreement to pay a reduced penalty of $100 should be approved.

Citation No. 795705 alleged that respondent had violated section 75.601 because the circuit breaker for the trailing cable of an offside shuttle car had been set 400 amps higher than it should have been. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated a normal effort to achieve compliance. The Assessment Office proposed a penalty of $114 and respondent has agreed to pay a penalty of $80. Respondent claims that no overcurrent was present. That allegation raises an issue as to whether the violation was as serious as the Assessment Office believed. I find that respondent's agreement to pay a reduced penalty of $80 should be approved.

Citation No. 795706 alleged that respondent had violated section 75.523 because the deenergization device, or panic bar, on a shuttle car was inoperative when tested. The Assessment Office believed that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated a better than average effort to achieve compliance. The Assessment Office proposed a penalty of $130 and respondent has agreed to pay a penalty of $100. Respondent claims that injury resulting from the violation was improbable and that few miners would be exposed to danger by the violation. Additionally, it should be noted that respondent had provided a panic bar, but it had become inoperative and there is nothing in the file to show how long the bar had been in an inoperative condition. In such circumstances, the violation may not have involved as much negligence or gravity as the Assessment Office assigned to those criteria. Therefore, respondent's agreement to pay a reduced penalty of $100 should be approved.

Citation No. 795712 alleged that respondent had violated section 75.904 because the 400-amp circuit breaker for the conveyor belt drive was not marked for identification. The Assessment Office considered that the violation involved ordinary negligence, that it was very serious, and that respondent had demonstrated a better than average effort to achieve compliance. The Assessment Office proposed a penalty of $150 and respondent has agreed to pay $115. Remarks on the inspector's statement allege that no other plug the size of the one for the conveyor belt was being used. Also the main plug had been marked, but the suboutlet had not been marked. Those factors would reduce the likelihood that the circuit breaker for the belt drive would be mistaken for the circuit breaker for a different piece of equipment. That consideration indicates that the Assessment Office may have assigned an excessive number of points under the criteria of negligence and gravity. Therefore, I find that respondent's agreement to pay a reduced penalty of $115 should be approved.

Citation No. 795713 alleged that respondent had violated section 75.601 because the circuit breaker for the battery charger was set 400 amps above the allowable setting. The Assessment Office believed that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated a better than average effort to achieve compliance. The Assessment Office proposed a penalty of $98 and respondent has agreed to pay $70. Respondent claims that conditions were unfavorable for occurrence of any injuries and that no injury caused by the violation could be expected. Therefore, the Assessment Office may have assigned more points under the criteria of both negligence and gravity than the facts warranted and respondent's agreement to pay a reduced penalty of $70 should be approved.

Citation No. 795714 alleged that respondent had violated section 75.516 because the power cables for the battery charger were not supported on insulators and were permitted to come into contact with combustible materials at several locations. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated a better than average effort to achieve compliance. The Assessment Office proposed a penalty of $106 and respondent has agreed to pay a penalty of $75. Respondent claims that the power cable was insulated. That fact indicates that the likelihood of fire was improbable and that the Assessment Office may have rated the violation as involving more negligence and gravity than the facts warrant. Therefore, respondent's offer to pay a reduced penalty of $75 should be approved.

Citation No. 795715 alleged that respondent had violated section 75.1722(b) because the tail pulley roller on a conveyor belt was not adequately guarded. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent demonstrated a normal good faith effort to achieve compliance. The Assessment Office proposed a penalty of $150 and respondent has agreed to pay a penalty of $115. It should be noted that the citation refers to failure to guard "adequately" rather than a failure to provide any guard at all. If a hearing had been held, a question of fact would have arisen as to whether respondent's guard was adequate. In such circumstances, it appears that the Assessment Office may have assigned a larger number of points under the criterion of gravity than was warranted. Therefore, respondent's agreement to pay a reduced penalty of $115 should be approved.

Citation No. 795716 alleged that respondent had violated section 75.515 because the trailing cable for the coal drill was not equipped with a suitable device to prevent strain from being exerted on the electrical connections within the drill. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent demonstrated a normal effort to achieve compliance. The Assessment Office proposed a penalty of $150 and respondent has agreed to pay a penalty of $115. The conditions set forth in the citation are ambiguous. The inspector alleges that respondent failed to provide a "suitable" fitting, but he fails to say that no fitting at all was provided. Additionally, there is nothing to show that there was any sign that the cable was worn or would have exposed anyone to an electrical shock at the time the citation was written. There is nothing in the inspector's statement which would show that the violation was as serious as the Assessment Office considered it to be. Therefore, respondent's offer to pay a penalty of $115 should be approved.

Citation No. 795717 alleged that respondent had violated section 75.1722(b) because the pulley roller to the tailpiece had not been adequately guarded. The Assessment Office considered that this violation involved ordinary negligence, that it was serious, and that respondent had demonstrated a normal effort to achieve compliance. The Assessment Office proposed a penalty of $150 and respondent has agreed to pay a penalty of $115. Here again, the citation shows that respondent had provided a guard, but that it was not as "adequate" as the inspector believed it should have been. The fact that respondent had provided a guard shows that the Assessment Office may have assigned an undue number of points under the criterion of negligence and justifies acceptance of respondent's offer to pay a reduced penalty of $115.

Citation No. 795718 alleged that respondent had violated section 75.400 because loose coal and coal dust had been permitted to accumulate on and around the two 40-horsepower motors on the feeder. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated a normal good faith effort to achieve compliance. The Assessment Office proposed a penalty of $122 and respondent has agreed to pay a penalty of $95. The Assessment Office reduced the proposed penalties with respect to several of the citations involved in this docket when respondent corrected the alleged violation within a period of 30 minutes. The alleged violation in this instance was corrected within a period of only 30 minutes, but no credit was given for that rapid effort to achieve compliance in this instance. Giving proper credit to respondent's effort to achieve rapid compliance justifies acceptance of respondent's offer to pay a reduced penalty of $95.

Docket No. KENT 79-183

Citation No. 794820 alleged that respondent had violated section 75.606 because there was evidence that the trailing cable to the cutting machine had been run over by rubber-tired equipment. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated a better than average effort to achieve compliance. The Assessment Office proposed a penalty of $106 and respondent has agreed to pay a penalty of $79. The inspector's statement indicates that respondent took extraordinary steps to gain compliance in this instance. Also the inspector's termination of the citation states that there was no short circuit in the trailing cable and that no damage had been done to the trailing cable by the equipment which appears to have run over it. In such circumstances, the Assessment Office may have assigned more points under the criterion of gravity than was warranted. Therefore, respondent's offer to pay a penalty of $79 should be approved.

Docket No. KENT 79-184

Order No. 795432 was issued under the unwarrantable failure provisions of the Act and alleged that respondent had violated section 75.200 by failing to install bolts on 5-foot centers in compliance with its roof-control plan. The roof bolts were alleged to be up to 6-1/2 feet apart in the Nos. 1

through 6 entries and 9 feet away from the ribs. Over 98 roof bolts had to be installed to restore the area to the requirements of the roof-control plan. The Assessment Office waived the point system normally used in determining penalties and made findings of fact as to the six criteria to support its proposed penalty of $5,000 which respondent has agreed to pay in full. The inspector's statement alleges that two roof falls had previously occurred in the section here involved. It appears that enough negligence and gravity were associated with the alleged violation to warrant imposition of a penalty of $5,000. Respondent's agreement to pay the full amount should be approved.

Docket No. KENT 79-185

Citation No. 9948483 alleged that respondent had violated section 70.250 by failing to submit a valid respirable dust sample or give a reason for not sampling for one employee. The Assessment Office considered that the violation involved ordinary negligence, that it was nonserious, and that respondent demonstrated a normal effort to achieve compliance. The Assessment Office proposed a penalty of $84 and respondent has agreed to pay $60. Section 70.250 requires that the atmosphere of each miner on a working section be sampled at intervals of 120 days and that the atmosphere of other miners be sampled at intervals of 180 days. The samples required under section 70.250 are unrelated to the sampling of the high-risk employee whose samples are used to determine if an operator's mine is in compliance with the respirable-dust program. While there is generally some negligence associated with the failure to submit the 120-day and 180-day samples, a penalty of $60 is a sufficient amount unless there is evidence to show that an operator has been grossly negligent in continuously violating section 70.250. Since there is no evidence in this proceeding to show that respondent frequently violated section 70.250, I believe that respondent's agreement to pay $60 should be approved.

Citation No. 795155 alleged that respondent had violated section 75.1714 because the operator of a roof-bolting machine was not provided with a self-rescue device. The Assessment Office considered that the violation involved no negligence, that it was serious, and that respondent demonstrated an average good faith effort to achieve compliance. The Assessment Office proposed a penalty of $84 and respondent has agreed to pay $60. The inspector's statement does not rate the seriousness of the violation. There must have been extenuating facts associated with the alleged violation or the inspector would not have considered the operator to be nonnegligent. In such circumstances, I believe that respondent's agreement to pay a penalty of $60 should be approved.

Docket No. KENT 79-186

Citation No. 795340 alleged that respondent had violated section 75.603 because a temporary splice in the trailing cable for the coal drill had been made by tying the conductors in square knots. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent demonstrated a better than average effort to achieve compliance. The Assessment Office proposed a penalty of $122 and respondent has agreed to pay $95. Respondent's evaluation sheet claims that the splice was well insulated and that no one would have been injured because of the use of square knots in the temporary splice. Moreover, respondent states that production was immediately stopped and the splice was remade in the correct manner. In such circumstances, the Assessment Office may have assigned more penalty points to the criterion of gravity than were warranted. Therefore, respondent's agreement to pay a penalty of $95 should be approved.

Citation No. 795521 alleged that respondent had violated section 75.605 because respondent had failed to clamp the trailing cable of the coal drill to the cable reel so as to prevent strain from being placed on the electrical connections. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated a normal effort to achieve compliance. The Assessment Office proposed a penalty of $122 and respondent has agreed to pay $95. The Assessment Office may have assigned excessive penalty points because the operator's evaluation sheet shows that the operator felt that it was improbable that an injury would occur as a result of the alleged violation. The operator believed the violation to be nonserious because the grounding mechanism was in good condition as well as the circuit breaker. Moreover, respondent alleges that it had made a better than average effort to achieve rapid compliance, but the Assessment Office considered that there had been only a normal effort to achieve compliance. In such circumstances, respondent's agreement to pay $95 should be approved.

Citation No. 795522 alleged that respondent had violated section 75.1107-16(b) because a loading machine's fire-suppression device had been rendered inoperative by a severed hose. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that the operator had demonstrated an outstanding effort to achieve compliance. The Assessment Office proposed a penalty of $84 and respondent has agreed to pay $60. The operator's evaluation sheet claims that the operator was nonnegligent and alleges that any injury as a result of the violation was improbable since the loading machine was in a clean condition and there was good ventilation in the mine. In such circumstances, the Assessment Office may have assigned an excessive number of points under the criteria of negligence and gravity. Therefore, respondent's agreement to pay a penalty of $60 should be approved.

Citation No. 795523 alleges that respondent had violated section 75.603 because a temporary splice had been made in the trailing cable on a roof-bolting machine and the splice was close to the reel. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated an outstanding effort to achieve rapid compliance. Respondent's evaluation sheet claims that it was nonnegligent because the miners had been instructed in proper splicing procedures and alleges that the violation was nonserious because the splice had been well insulated. In such circumstances, respondent's agreement to pay a penalty of $95, instead of the penalty of $122 proposed by the Assessment Office, should be approved.

Citation No. 795524 alleged that respondent had violated section 75.1722 because 5 feet of the fencing used to guard the belt head were missing which would permit a person to come in contact with moving head rollers. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated a better than average effort to achieve rapid compliance. The Assessment Office proposed a penalty of $114 and respondent has agreed to pay $80. The Assessment Office may have assigned an excessive number of points under the criteria of negligence and gravity because respondent's evaluation sheet claims that respondent was nonnegligent and that the likelihood of injury was improbable. In such circumstances, respondent's offer to pay a penalty of $80 should be approved.

Citation No. 795525 alleged that respondent had violated section 75.202 because overhanging ribs ranging in size from 12 to 28 inches were observed in four entries. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated an outstanding effort to achieve rapid compliance. The Assessment Office proposed a penalty of $106 and respondent has agreed to pay $75. The respondent's evaluation sheet claims that the violation involved no negligence and alleges that the overhanging ribs were not large enough to have been likely to injure anyone. It appears that the Assessment Office may have assigned an excessive number of points under the criteria of negligence and gravity. Therefore, respondent's agreement to pay a penalty of $75 should be approved.

Citation No. 795526 alleged that respondent had violated section 75.503 because the loading machine had two openings which exceeded the width permitted by the permissibility standards. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that the operator demonstrated a better than average effort to achieve rapid compliance. The Assessment Office proposed a penalty of $98 and respondent has agreed to pay $70. Respondent's evaluation sheet claims that the mine atmosphere contained no methane and that the weekly check of equipment had revealed no permissibility violations. In view of the contested facts, the Assessment Office may have assigned excessive points under the criteria of negligence and gravity. Therefore, respondent's offer to pay a penalty of $70 should be approved.

Citation Nos. 795527 and 795528 alleged that respondent had violated section 75.503 because permissibility violations existed in a shuttle car and cutting machine, respectively. The Assessment Office considered that both violations involved ordinary negligence, that they were serious, and that respondent demonstrated a better than average effort to achieve rapid compliance with respect to Citation No. 795527 and demonstrated a normal effort to achieve compliance with respect to Citation No. 795528. The Assessment

Office proposed a penalty of $122 and $98 for Citation Nos. 795527 and 795528, respectively, and respondent has agreed to pay penalties of $95 and $70, respectively. The operator's evaluation sheet claims that the weekly examination had revealed no permissibility violations, that no methane was present, and that ventilation was good. In view of the extenuating circumstances alleged by the operator, I find that respondent's agreement to pay penalties of $95 and $70 should be approved.

Citation No. 795536 alleged that respondent had violated section 75.1722 because the belt feeder head roller was not adequately guarded in that the wire guard had been pulled back far enough to expose a person to the hazard of being caught in the roller. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had made a better than average effort to achieve rapid compliance. The Assessment Office proposed a penalty of $114 and respondent has agreed to pay a penalty of $80. Respondent's evaluation sheet indicates that the belt examiners had not yet made their inspection as the citation was written at 7:50 a.m. Respondent corrected the violation within 10 minutes after the citation was written. In such circumstances, I find that respondent's agreement to pay $80 should be approved.

Citation No. 795538 alleged that respondent had violated section 75.200 because a crosscut between the Nos. 4 and 5 entries was 25 feet wide in violation of respondent's roof-control plan which permits crosscuts to be no more than 20 feet wide. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated an outstanding effort to achieve rapid compliance. The Assessment Office proposed a penalty of $170 and respondent has agreed to pay $130. Respondent's evaluation sheet claims that the wide crosscut was needed for the purpose of turning the mining machine around and that it was improbable that injury would result from the violation, and that production was stopped so that the crosscut could be timbered immediately. Respondent's evaluation sheet raises questions as to whether the alleged violation was as serious or involved as much negligence as the Assessment Office believed. Therefore, respondent's agreement to pay a penalty of $130 should be approved.

Citation No. 795539, as modified, alleged that respondent had violated section 75.316 because there was an excessive amount of dust in the No. 4 Unit as a result of respondent's failure to use water to control dust. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated an outstanding effort to achieve rapid compliance. The Assessment Office proposed a penalty of $106 and respondent has agreed to pay $75. Respondent's evaluation sheet contends that no violation occurred as no dust was in suspension. In view of the question of fact which would have been raised if a hearing had been held, I find that respondent's agreement to pay a penalty of $75 should be approved.

Citation No. 795540 alleged that respondent had violated section 75.200 because a roof bolter was not provided with two temporary supports as required by the roof-control plan. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated an outstanding effort to achieve rapid compliance. The Assessment Office proposed a penalty of $98 and respondent has agreed to pay $70. Respondent's evaluation sheet alleges that no roof bolting had yet been done and that the roof was in good condition. If a hearing had been held, questions of fact would have been raised as to respondent's negligence and as to the gravity associated with failure to install temporary supports before any roof bolting had been started. Therefore, respondent's agreement to pay a penalty of $70 should be approved.

Citation No. 796521 alleged that respondent had violated section 75.503 because there were nonpermissible openings on a scoop while it was being used inby the last open crosscut in No. 2 entry. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated an outstanding effort to achieve rapid compliance. The Assessment Office proposed a penalty of $106 and respondent has agreed to pay $75. Respondent's evaluation sheet claims that no methane was present in the mine atmosphere and that there was no likelihood of an explosion. In view of the questions of fact raised by respondent's claim that the violation was nonserious, respondent's agreement to pay a penalty of $75 should be approved.

Citation No. 796522 alleged that respondent had violated section 75.316 because an airlock had not been provided at the belt tailpiece. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated an outstanding effort to achieve rapid compliance. The Assessment Office proposed a penalty of $84 and respondent has agreed to pay a penalty of $60. Respondent's evaluation sheet claims that an airlock had been constructed but that it had been torn down when it became caught in the belt conveyor. Respondent also claims that good ventilation was being maintained on the section. If a hearing had been held, questions of fact would have been raised as to whether respondent was negligent and as to whether the violation was serious in the circumstances. Therefore, respondent's agreement to pay $60 should be approved.

Citation No. 796523 alleged that respondent had violated section 75.703 because a battery charger was being used to charge the batteries on a scoop without providing a proper frame ground for the charger. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent had demonstrated an outstanding effort to achieve rapid compliance. The Assessment Office proposed a penalty of $140 and respondent has agreed to pay a penalty of $110. Respondent's evaluation sheet claims that the frame ground was torn loose during the shift preceding the shift on which the inspector's citation was written and that chargers are equipped with back-up grounding systems. If a hearing had been held, questions of fact would have been raised as to the extent of respondent's negligence and as to the gravity of the violation. Therefore, I find that respondent's agreement to pay a penalty of $110 should be approved.

Citation No. 796525 alleged that respondent had violated section 75.303 because inadequate examinations of the conveyor belts had been made in that obvious violations were observed by the inspector but a record of the violation had not been recorded in the approved belt examiners' book located on the surface. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent made a normal effort to achieve compliance. Respondent's evaluation sheet claims that management had no knowledge that the belts were not being adequately examined and that they had been examined that day. If a hearing had been held, a number of factual issues would have been raised as to whether respondent was negligent and as to the gravity of the alleged violation. Therefore, respondent's agreement to pay a penalty of $140, instead of the penalty of $180 proposed by the Assessment Office, should be approved.

Citation No. 596531 alleged that respondent had violated section 75.606 because a scoop was observed as it was driven over the energized cable of the loading machine. The Assessment Office considered that the violation involved no negligence, that it was serious, and that respondent had demonstrated a normal effort to achieve compliance. The Assessment Office proposed a penalty of $84 and respondent has agreed to pay $60. Respondent's evaluation sheet claims that management had no control over the situation because the employee disobeyed company orders in running over the cable. Respondent also claims that the grounding mechanism and circuit breaker were operative. The inspector's citation shows that the violation was corrected within 10 minutes and that it was determined that the loading machine's cable had not been damaged. The Assessment Office failed to give respondent credit for stopping production to make a quick examination of the cable. In such circumstances, respondent's agreement to pay a penalty of $60 should be approved.

Docket No. KENT 79-187

Citation No. 401741 alleged that respondent had violated section 70.100(b) because the average concentration of respirable dust in the environment of the high-risk miner was 3.6 milligrams per cubic meter of air. The Assessment Office considered that the violation involved ordinary negligence, that it was very serious, and that respondent demonstrated a normal effort to achieve compliance. The Assessment Office proposed a penalty of $255 and respondent has agreed to pay a penalty of $200. Neither the official file nor the materials submitted with the motion to approve settlement contain any statements showing that the Assessment Office incorrectly overstated the negligence or seriousness of the alleged violation. On the other hand, respondent's agreement to pay $200 for this violation of the respirable dust standard shows that the parties have recognized that the degree of negligence and gravity associated with this alleged violation was rather high. Since there is nothing in the record to show how long the condition lasted, I conclude that the miners were not exposed to 3.6 milligrams of respirable dust for a long period of time. Therefore, respondent's agreement to pay $200 is reasonable and should be approved.

Citation No. 794976 alleged that respondent had violated section 75.301 because respondent had not provided enough air at the working face for the velocity of the air to be measured with an anemometer. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent demonstrated an outstanding effort to achieve rapid compliance. The Assessment Office proposed a penalty of $106 and respondent has agreed to pay $75. Respondent's evaluation sheet explains that the curtain had been torn by a shuttle car, that the helper of the cutting-machine operator was in the process of moving up the waterline, and that no methane was detected. The inspector's citation shows that respondent increased the velocity of air to 3,600 cubic feet within 5 minutes after the citation was written. I find that there were enough extenuating circumstances to justify acceptance of respondent's offer to pay a penalty of $75.

Citation No. 794978 alleged that respondent had violated section 75.316 by failing to have two water sprays on the cutting machine. Respondent's ventilation, methane, and dust control plan requires that the machine have two operable sprays. The Assessment Office considered that the violation involved ordinary negligence, that it was serious, and that respondent demonstrated a better than average effort to achieve rapid compliance. The Assessment Office proposed a penalty of $140 and respondent has agreed to pay $110. Respondent's evaluation sheet claims that two water sprays had been installed on the cutting machine and that one had been knocked off. Respondent claims that management was unaware of the missing spray because one spray was doing an adequate job of wetting the coal. Respondent also claims that production was stopped and that an additional spray was installed within a period of 30 minutes. In such extenuating circumstances, respondent's offer to pay a penalty of $110 should be approved.

WHEREFORE, it is ordered:

(A) For the reasons hereinbefore given, the seven motions for approval of settlement filed in this proceeding on December 31, 1979, are granted and the settlement agreements are approved.

(B) Pursuant to the settlement agreements, respondent, within 30 days from the date of this decision, shall pay civil penalties totaling $8,378.00 which are allocated to the respective alleged violation as follows:

Docket No. KENT 79-181

Citation No. 795149 3/8/79 § 77.1607(o)...........	$	14.00
Citation No. 795152 3/12/79 § 77.410.............		60.00
Total Settlement Penalties in Docket No. KENT 79-181....................	$	74.00

Docket No. KENT 79-182

Citation No. 795701 3/20/79 § 75.1100-1(e)........	$	65.00
Citation No. 795702 3/20/79 § 75.1100-2(d)........		70.00

Citation No. 795703 3/20/79 § 75.601-1	70.00
Citation No. 795704 3/20/79 § 75.1722(a)	100.00
Citation No. 795705 3/20/79 § 75.601	80.00
Citation No. 795706 3/20/79 § 75.523	100.00
Citation No. 795712 3/27/79 § 75.904	115.00
Citation No. 795713 3/27/79 § 75.601	70.00
Citation No. 795714 3/27/79 § 75.516	75.00
Citation No. 795715 3/27/79 § 75.1722(b)	115.00
Citation No. 795716 3/29/79 § 75.515	115.00
Citation No. 795717 3/29/79 § 75.1722(b)	115.00
Citation No. 795718 3/29/79 § 75.400	95.00
Total Settlement Penalties in Docket No. KENT 79-182	$1,185.00

Docket No. KENT 79-183

Citation No. 794820 2/5/79 § 75.606	$ 79.00
Total Settlement Penalties in Docket No. KENT 79-183	$ 79.00

Docket No. KENT 79-184

Order No. 795432 2/15/79 § 75.200	$5,000.00
Total Settlement Penalties in Docket No. KENT 79-184	$5,000.00

Docket No. KENT 79-185

Citation No. 9948483 3/2/79 § 70.250	$ 60.00
Citation No. 795155 4/3/79 § 75.1714	60.00
Total Settlement Penalties in Docket No. KENT 79-185	$ 120.00

Docket No. KENT 79-186

Citation No. 795340 3/19/79 § 75.603	$ 95.00
Citation No. 795521 3/19/79 § 75.605	95.00
Citation No. 795522 3/19/79 § 75.1107-16(b)	60.00
Citation No. 795523 3/20/79 § 75.603	95.00
Citation No. 795524 3/20/79 § 75.1722	80.00
Citation No. 795525 3/21/79 § 75.202	75.00
Citation No. 795526 3/21/79 § 75.503	70.00
Citation No. 795527 3/21/79 § 75.503	95.00
Citation No. 795528 3/21/79 § 75.503	70.00
Citation No. 795536 3/27/79 § 75.1722	80.00
Citation No. 795538 3/27/79 § 75.200	130.00

Citation No. 795539 3/27/79 § 75.316..............	75.00
Citation No. 795540 3/27/79 § 75.200..............	70.00
Citation No. 796521 3/27/79 § 75.503..............	75.00
Citation No. 796522 3/27/79 § 75.316..............	60.00
Citation No. 796523 3/27/79 § 75.703..............	110.00
Citation No. 796525 3/29/79 § 75.303..............	140.00
Citation No. 796531 3/30/79 § 75.606..............	60.00
Total Settlement Penalties in Docket No. KENT 79-186.....................	$1,535.00

Docket No. KENT 79-187

Citation No. 401741 12/12/78 § 70.100(b)..........	$ 200.00
Citation No. 794976 4/6/79 § 75.301...............	75.00
Citation No. 794978 4/6/79 § 75.316...............	110.00
Total Settlement Penalties in Docket No. KENT 79-187.....................	$ 385.00
Total Settlement Penalties in This Proceeding..........................	$8,378.00

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

George Drumming, Jr., Attorney, Office of the Solicitor, U.S. Department of Labor, Room 280, U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Pyro Mining Company, Attention: Bennie E. Morgan, Director of Safety and Training, P.O. Box 267, Sturgis, KY 42459 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 28 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PIKE 79-22-P
Petitioner : Assessment Control No.
v. : 15-09646-03001
:
TRIPLE S COAL COMPANY, : Mine No. 2
Respondent :

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Gary Stiltner, Ash Camp, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to written notice dated April 12, 1979, as amended May 7, 1979, a hearing in the above-entitled proceeding was held on May 17, 1979, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

MSHA's Petition for Assessment of Civil Penalty was filed on November 14, 1978, in Docket No. PIKE 79-22-P seeking assessment of a civil penalty for an alleged violation of 30 CFR 75.1711 by respondent.

Issues

The issues raised by the Petition for Assessment of Civil Penalty are whether a violation of 30 CFR 75.1711 occurred and, if so, what monetary penalty should be assessed, based on the six criteria set forth in section 110(i) of the Act. My decision as to whether a violation occurred will be based on the findings of fact set forth below:

Findings of Fact

(1) The respondent in this proceeding is Triple S Coal Company which is a four-man partnership (Tr. 19). For a short period of time, respondent operated a No. 1 Mine near Feds Creek, Kentucky. Respondent subleased the mineral rights to the coal in its No. 1 Mine from Hawkins Coal Company.

(2) Another company, B D and D Coal Company, operated a mine about one-half mile from respondent's No. 1 Mine. B D and D Coal Company also subleased the mineral rights to the coal in its mine from Hawkins Coal Company. After BD&D had stopped producing coal in its mine, Hawkins Coal Company asked Mr. Gary Stiltner, one of the copartners in Triple S Coal Company, to inspect the mine which BD&D had abandoned to determine if any more coal could economically be produced from that mine (Tr. 20).

(3) After a coal mine is abandoned, no person may reenter that mine without filing with MSHA for permission to reopen the mine (Tr. 21). Therefore, in order for Mr. Stiltner to inspect the mine abandoned by BD&D, it was necessary for him to travel to Phelps, Kentucky, and execute certain forms which indicated that Triple S Coal Company wished to reopen, as its No. 2 Mine, the mine which BD&D had abandoned (Exh. 4; Tr. 20).

(4) In May 1977, Mr. Stiltner and two MSHA inspectors examined the No. 2 Mine to determine whether there was coal in the mine which could be produced economically (Tr. 22). The MSHA inspectors and Mr. Stiltner found that so much work would have to be done to the No. 2 Mine to make it operable, that the small amount of coal reserves remaining in the mine could not be economically produced (Tr. 20). After he had determined that the No. 2 Mine could not be operated economically, Mr. Stiltner returned to MSHA's office and filled out the necessary forms to show that Triple S Coal Company had abandoned the No. 2 Mine (Tr. 20). MSHA's Mine Information Form alleges that Triple S Coal Company had four men working at the No. 2 Mine, but not producing coal. Mr. Stiltner intended for the information furnished to MSHA to show how many men planned to work at the No. 2 Mine if the initial inspection of the mine had indicated that the No. 2 Mine could become a feasible operation (Tr. 21-22; Exh. 4).

(5) As it turned out, Triple S Coal Company never did produce any coal at the No. 2 Mine and none of the Triple S Coal Company's copartners, other than Mr. Stiltner, ever went to the No. 2 Mine, and Mr. Stiltner only entered the No. 2 Mine once while in the company of two MSHA inspectors (Tr. 22).

(6) Section 75.1711 provides that any coal mine which is permanently closed, or abandoned for more than 90 days, shall be sealed by the operator of the mine in a manner prescribed by the Secretary. The manner of sealing is set forth in section 75.1711-2 providing that the entries of abandoned or closed mines are to be sealed with materials such as concrete blocks or by filling the entries with incombustible material for a distance of 25 feet. Additionally, drain pipes at least 4 inches in diameter must be installed in at least one entry (Tr. 10).

(7) An MSHA inspector examined the site of respondent's No. 2 Mine on September 20, 1977, and found that the Nos. 1 and 3 entries had been properly sealed, but the Nos. 2 and 4 entries had not been properly sealed. Dirt had been pushed into the Nos. 2 and 4 entries for a distance of only about 5 or 10 feet and there was space above the dirt through which persons could enter the mine (Tr. 6-7).

(8) After observing the conditions described in paragraph (7) above, the inspector issued Notice No. 1 ELF (7-2) on September 20, 1977, citing respondent for a violation of section 75.1711 (Tr. 6; Exh. 1).

On the basis of the findings set forth above, I conclude that a violation of section 75.1711 occurred. Mr. Stiltner was actually making an economic evaluation of the coal reserves remaining in the No. 2 Mine as an agent for Hawkins Coal Company (Tr. 21), but there is nothing on the Mine Information Form in MSHA's files to show that Mr. Stiltner was acting for Hawkins. The Mine Information Form shows only that Triple S Coal Company had applied for permission to reopen the mine which BD&D had been operating. The Form shows that Triple S Coal Company intended to operate the mine as its No. 2 Mine. Although Mr. Stiltner was acting as Hawkins' agent, he was also acting on behalf of the partnership which owned Triple S Coal Company because he stated that if producible coal reserves had been found, the four partners who comprised Triple S Coal Company would have jointly participated in operating the No. 2 Mine (Tr. 27-28; Exh. 3).

Having found that a violation occurred, it is now necessary to consider the six criteria before assessing a civil penalty.

Size of Respondent's Business

Respondent's No. 1 Mine produced only about 20 tons of coal daily over a short period of time (Tr. 26). Respondent never did operate the No. 2 Mine as an active mine (Tr. 18; 21). The four partners who operated the No. 1 Mine are now producing coal from a mine in Virginia under the name of G and R Coal Company. The reserves from the Virginia mine were obtained from Bostic Coal Company. The Virginia mine produces about 50 or 60 tons of coal per day. The coal was sold to Bostic Coal Company until May 14, 1979, when Bostic notified the partners that it no longer had any orders to fill and would not purchase any more coal from the four partners until further notice (Tr. 29-30).

On the basis of the facts set forth above, I find that respondent is a very small operator and that the penalty should be assessed in a low range of magnitude to the extent that it is determined under the criterion of the size of respondent's business.

Effect of Penalties on Ability of Respondent To Continue in Business

The facts reviewed above show that the four partners are now operating only a single coal mine. At the time of the hearing, they were stockpiling their coal because they had no market for it. Even when they have a market for their coal, they would be likely to have a marginal operation because they were producing only 50 to 60 tons per day. I find that some consideration should be given in assessing a penalty to the criterion of whether payment of penalties will cause respondent to discontinue in business.

History of Previous Violations

Counsel for MSHA stated at the commencement of the hearing that respondent does not have a history of previous violations at its No. 2 Mine (Tr. 3). Therefore, it is unnecessary to consider the criterion of history of previous violations in assessing a penalty.

Good Faith Effort To Achieve Rapid Compliance

Notice No. 1 ELF was written on September 20, 1977, and provided that respondent should have until October 21, 1977, within which to seal the entries on the No. 2 Mine (Exh. 1). On October 25, 1977, an inspector other than the one who had written Notice No. 1 ELF issued Order of Withdrawal No. 1 HB stating that entry No. 1 was not properly sealed and that no drain pipes had been provided for the Nos. 1, 2 and 3 openings within the time allowed. The conditions stated in the withdrawal order imply the existence of sealing requirements which are inconsistent with MSHA's actual requirements for the sealing of abandoned mines. The withdrawal order alleges that respondent had failed to place drain pipes in the Nos. 1, 2 and 3 entries, whereas MSHA's reqirements for installation of drain pipes state (Tr. 10-11):

> * * * A means to prevent a build-up of water behind the seal shall be provided in at least one of the seals. Metal pipes used for this purpose shall be a minimum of 4 inches in diameter and shall be installed of sufficient height above the bottom of the seal to prevent it from becoming blocked with mud or debris. [Emphasis supplied.]

The inspector who wrote Notice No. 1 ELF testified that no drains had been placed in the entries and that the Nos. 1 and 3 entries had been sealed, whereas the Nos. 2 and 4 entries had not been adequately sealed (Tr. 7). The order of withdrawal alleges that only the No. 1 entry had not been adequately sealed and that drains were needed in three of the four entries. The inference which could be drawn from the order of withdrawal is that some work had been done between the writing of the notice by one inspector and the issuance of the withdrawal order by a different inspector. Inasmuch as the inspector who wrote the notice had not been back to the mine after he issued the notice and since Mr. Stiltner had not returned to the mine after the notice was written, there were no witnesses at the hearing who could state whether any work had been done to improve the seals on the entries between the time the notice was issued and the time the withdrawal order was issued.

Respondent's defense in this proceeding has always been that since it owned neither the mineral rights nor the land on which the No. 2 Mine was situated, it was not obligated to seal the mine under the requirements of section 75.1711 (Tr. 23). Mr. Stiltner testified that the owner of the land on which respondent's No. 1 Mine was located did not want the entries sealed after respondent abandoned the No. 1 Mine, but Hawkins Coal Company, from whom he subleased the coal, had sealed the entries to the No. 1 Mine despite the land owner's objections. Mr. Stiltner stated that whatever work had been done in sealing the entries to the No. 2 Mine had also been done by someone hired by Hawkins Coal Company (Tr. 23).

The facts reviewed above show that Hawkins Coal Company may have attempted to do some additional work toward sealing the No. 2 Mine after the notice was issued, but there is no specific evidence in the record to support a finding that Hawkins or anyone else actually did any additional work toward sealing the mine after the notice was issued. The discrepancies between the conditions described in Notice No. 1 ELF and Order No. 1 HB may have resulted from two inspectors having come to slightly different conclusions after examining the same physical evidence.

In order to find that respondent made a good faith effort to achieve compliance, there should be some evidence showing that respondent took some kind of action to make certain that all the entries of the No. 2 Mine were sealed after Notice No. 1 ELF was issued, but the evidence shows that respondent did nothing. Although respondent knew that Hawkins Coal Company had undertaken to seal the entries before the notice was issued, respondent made no effort to get Hawkins to improve or complete the sealing work which had already been started. Mr. Stiltner knew that Hawkins had hired a third party to do the work that had been done before the notice was written (Tr. 23). It is inconceivable that Hawkins would have hired a third party to seal the entries in a fashion which would not pass MSHA's inspection. That third party was liable to Hawkins for doing a satisfactory job in sealing the entries. The least that respondent should have done would have been to have reported to Hawkins that the No. 2 Mine had not been properly sealed and that as a result of the poor workmanship done by the third party which Hawkins had hired to seal the entries, respondent had been cited for a violation of section 75.1711. Respondent could have then insisted that Hawkins have the third party complete the work which had been started, but not completed in a satisfactory manner.

Respondent's failure to do anything whatsoever after Notice No. 1 ELF was issued supports a finding, and I so find, that respondent failed to make a good faith effort to achieve compliance after Notice No. 1 ELF was issued. Therefore, respondent's indifference about seeing that the mine was properly sealed will be given considerable weight in assessing a penalty.

Negligence

As indicated above, respondent did not own the mineral rights to the coal and did not own the land on which the No. 2 Mine was situated. The land owner did not want the mine entries sealed after respondent had abandoned its No. 1 Mine, but Hawkins Coal Company, which owned the mineral rights, sealed the entries despite the contrary wishes of the land owner (Tr. 24-25). Respondent has been involved in several coal-mining operations and is knowledgeable about the obligations which an operator has to assume when he abandons a mine. Moreover, MSHA sends each operator who abandons a mine a letter advising him that he must do certain things. Among those things is the requirement that he seal the openings of the mine which he has abandoned (Tr. 9-10). Respondent did not deny that it had received that sort of information from MSHA.

Even if MSHA failed to send a letter to respondent advising him about the requirement that entries of abandoned mines are required to be sealed, the former Board of Mine Operations Appeals held in Freeman Coal Mining Co., 3 IBMA 434 (1974), that the operator is conclusively presumed to know what the mandatory health and safety standards are. Consequently, I find that respondent's failure to inquire about the sealing of the No. 2 Mine involved ordinary negligence even though respondent expected Hawkins Coal Company to do the actual sealing of the mine. Respondent's witness agreed at the hearing that abandonment of the No. 2 Mine involved the furnishing of a final map just as if respondent had actually produced coal from the No. 2 Mine (Tr. 23). Since respondent also knew that the entries had to be sealed (Tr. 23), he should have made an effort to seal the mine or determine for certain that Hawkins Coal Company intended to seal the entries as required by section 75.1711.

Gravity of the Violation

The inspector stated that the danger associated with failure to seal the mine was that the mine was located about one-half mile from the nearest residence and that a person might venture to the site of the mine and might enter it and be injured or killed either by rocks falling from the roof or by encountering air devoid of oxygen. The No. 2 Mine was a relatively shallow mine which extended only about 400 feet underground (Tr. 8-9), but that would be a sufficient distance for a person to be injured or killed if he should venture into the mine. The mine was located only 2 miles from a school house and it is easily possible that someone from the school might walk to the mine from the school and be injured (Tr. 5). Therefore, I find that the violation was serious.

Assessment of Penalty

There are many extenuating circumstances associated with assessing a penalty in this proceeding. The facts show that Mr. Stiltner was acting as an agent of Hawkins Coal Company. He apparently expected Hawkins Coal Company to seal the No. 2 Mine just as it sealed his No. 1 Mine. Hawkins Coal Company's failure to seal the mine adequately resulted in respondent's being cited for the violation of section 75.1711. As Mr. Stiltner conceded at the hearing, he made a mistake in not showing on the Mine Information Form that it was really Hawkins Coal Company which wanted the No. 2 Mine reopened in order to evaluate the economic feasibility of recovering coal from that mine (Tr. 21). If Hawkins Coal Company's name had appeared on the Mine Information Form, there is reason to assume that Notice No. 1 ELF would have been issued in the name of Hawkins Coal Company instead of Triple S Coal Company.

It seems somewhat unfair to require respondent to pay a civil penalty for failure to perform an obligation which another company probably should have done, and did attempt to do in an inadequate fashion. There was no information in MSHA's files, however, which even hinted that Mr. Stiltner was really having the No. 2 Mine reopened at the request of Hawkins Coal Company. Therefore, MSHA properly held Triple S Coal Company liable for sealing the mine because it had no reason to believe that any other entity was liable.

Considering that respondent operates a very small business, that its operations would be adversely affected by a large penalty, that a good faith effort was not made to achieve compliance, that there is no history of previous violations, that ordinary negligence was involved, and that the violation was serious, a penalty of $150 will hereinafter be assessed for this violation of section 75.1711.

Ultimate Findings and Conclusions

(1) Respondent should be assessed a civil penalty of $150.00 for the violation of section 75.1711 cited in Notice No. 1 ELF (7-2) dated September 20, 1977.

(2) Respondent, as the operator of record of the No. 2 Mine, is subject to the Act and to the regulations promulgated thereunder.

WHEREFORE, it is ordered:

Respondent, within 30 days from the date of this decision, shall pay a civil penalty of $150.00 for the violation described in paragraph (1) above.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

John H. O'Donnell, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Triple S Coal Company, Attention: Gary Stiltner, Copartner, P.O. Box 196, Ash Camp, KY 41512 (Certified Mail)

G & R Coal Company, Attention: Gary Stiltner, Copartner, Route 3, Box 10, Cedar Bluffs, VA 24609 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 28 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. BARB 79-157-P A.C. No. 15-09816-03002
v.	:	
BLACK JACK COAL COMPANY, INC., Respondent	:	No. 1 Surface Mine

DECISION

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Larry Cleveland, Esq., Frankfort, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to written notice dated April 12, 1979, a hearing in the above-entitled proceeding was held on May 16, 1979, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

MSHA's Petition for Assessment of Civil Penalty in this proceeding was filed on December 13, 1978, and seeks to have civil penalties assessed for three alleged violations of the mandatory health and safety standards by respondent.

Issues

In a civil penalty proceeding, the issues normally raised by the Petition for Assessment of Civil Penalty are whether violations occurred and, if so, what monetary penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act. In this proceeding, counsel for respondent stipulated that the violations alleged in MSHA's citations had occurred and that the only matters which he wished to have me consider are those pertaining to the six criteria (Tr. 3).

Four of the six criteria may usually be given a general evaluation, but in this proceeding it is perferable to consider on a generalized basis only two of the criteria, namely, the size of respondent's business and the question of whether the payment of penalties would cause respondent to discontinue in business. The remaining four criteria, that is, respondent's good faith effort to achieve rapid compliance, respondent's negligence, if any, the gravity of the violations, and respondent's history of previous violations, will be considered on an individual basis when the parties' evidentiary presentations are hereinafter reviewed. The two criteria concerning the size of respondent's business and whether the payment of penalties would cause respondent to discontinue in business are considered below.

Size of Respondent's Business

The three citations to be considered in this proceeding were all written on April 12, 1978. At that time, respondent's mine employed about 20 men and produced approximately 500 tons of coal per day from the Little Caney coal seam (Tr. 6-7). At the time of the hearing, which was held on May 16, 1979, respondent was employing between 60 and 70 miners and was producing about 290,000 tons of coal per year, or about 1,160 tons per day, assuming that the coal mine operated 250 days each year (Tr. 51). Those facts support a finding that respondent is a relatively small operator and that penalties should be assessed in a fairly low range of magnitude insofar as the penalties are determined under the criterion of the size of respondent's business.

Effect of Penalties on Operator's Ability To Continue in Business

Respondent's witness testified that assessment of penalties in the range proposed by the Assessment Office, that is, $150 for each alleged violation, would not be likely to cause respondent to discontinue in business. A company which has tripled its working force in a period of about 1 year is not likely to discontinue in business even if penalties considerably greater than $150 were to be assessed. Inasmuch as respondent is operating a strip mine, it is likely that exhaustion of suitably located coal reserves is more likely to cause it to discontinue in business than payment of penalties.

Citation No. 123424 April 12, 1978 § 77.107 (Exhibit 2)

Findings. Section 77.107 requires every operator of a coal mine to provide a program approved by the Secretary for the training and retraining of personnel in the tasks which they are required to perform as certified and qualified persons. Respondent stipulated that the violation occurred (Tr. 3). The violation was moderately serious because there is no way to be certain that mine personnel have been scheduled to receive training in such subjects as first aid, mine rescue, safety regulations, use of self-rescuer, methods for detecting methane and oxygen deficiency, etc., unless respondent has a written program providing for such training. Respondent was negligent in failing to have a program because such programs were required to be submitted on or before September 30, 1971, and respondent should certainly have submitted the program by April 12, 1978 (Tr. 9-20).

Conclusions. Respondent's witness stated that he was certain that he had certified persons at his mine, but he was unaware that they had to be retrained on an annual basis (Tr. 45-46). It is no doubt difficult to keep abreast of the regulations, but the former Board of Mine Operations Appeals held in Freeman Coal Mining Co., 3 IBMA 434 (1974), that the operator is conclusively presumed to know what the mandatory health and safety standards are. The mine foreman did not have a card to show that he had received the necessary annual retraining in the required subjects (Tr. 20).

The inspector conceded that respondent's personnel appeared to be competent in operating their equipment but he stated that he could not conclude from their ability to operate equipment that they also knew how to administer first aid in case of an accident nor that they knew how to test for oxygen deficiency or the presence of methane (Tr. 18). The fact that a mine foreman may at some time have had an initial course in first aid is not a reason to reduce the degree of negligence involved in respondent's failure to submit a training program for MSHA's approval as required by section 77.107.

Considering that respondent operates a relatively small business, that the violation was moderately serious, that respondent was negligent, that respondent showed a normal good faith effort to achieve compliance, and that respondent has not previously violated section 77.107, a penalty of $75 will hereinafter be imposed.

Citation No. 123425 April 12, 1978 § 77.106 (Exhibit 4)

Findings. Section 77.106 requires the operator of each coal mine to maintain a list of all certified and qualified persons. Respondent stipulated that a violation of section 77.106 had occurred (Tr. 3). The violation was nonserious. Respondent was negligent in failing to maintain a list of certified and qualified persons (Tr. 21-30).

Conclusions. In the inspector's opinion, it is important for each operator of a coal mine to make a list of the persons who are certified at his mine so that everyone will know which person is in charge in case a miner should be injured (Tr. 24). On cross-examination, the inspector conceded, however, that the miners would expect the foreman to be in charge in case of an emergency (Tr. 28).

The operator submitted to MSHA's office located in Barbourville, Kentucky, a list of three persons for the purpose of complying with section 77.106. The list was received in evidence as Exhibit 10. The three persons whose names appear on the list received a first-aid course, but the list does not indicate the dates on which the three persons received first-aid training. Nevertheless, the inspector stated that he had been accepting a list such as that submitted by respondent as satisfactory compliance with section 77.106 (Tr. 32-33).

Considering that a moderately small operator is involved, that the violation was nonserious, that ordinary negligence was involved, that respondent showed a normal good faith effort to achieve compliance, and that respondent has not previously violated section 77.106, I believe that a penalty of $25 is reasonable, especially since the charge in Citation No. 123424 for failure to have a training program somewhat overlaps the charge in Citation No. 123425 for failure to submit a list of certified persons.

Citation No. 123426 April 12, 1978 § 77.1000 (Exhibit 6)

Findings. Section 77.1000 requires each operator to establish and follow a ground control plan for the safe control of all highwalls, pits, and spoil banks to be developed at his mine. It was stipulated that respondent had violated section 77.1000 (Tr. 3). The violation was nonserious because the inspector stated that respondent's highwall and spoil bank were both stable and that he saw no violation in the way respondent was controlling his highwall. Respondent was negligent for failing to have and to submit a ground control plan (Tr. 37-41).

Conclusions. Respondent's witness stated that he thought the ground control plan was associated with the surface mining regulations which are administered by the Department of the Interior. He understood that those regulations were to become effective on May 3, 1978. He said he was, therefore, surprised to be cited on April 12, 1978, for failure to have a ground control plan (Tr. 50; 60). It is difficult to keep informed as to all the regulations pertaining to mining coal, but respondent's witness stated on cross-examination that he had not tried to obtain clarification as to the regulations even though his mine is not far from the MSHA office at Hazard, Kentucky (Tr. 54). Additionally, Exhibit 1 indicates that respondent was previously cited for a violation of section 77.1000 on July 15, 1976. That previous violation should have made him acutely aware of the fact that he was required to establish a ground control plan and submit it to MSHA before May 3, 1978.

Respondent's witness did, however, appear to be sincerely interested in complying with all safety regulations and he stated that he had been mining coal for 3 years without ever having had a lost-time accident at his mine (Tr. 47). Respondent's witness stated that he had asked for a hearing on the three violations involved in this proceeding primarily because he wanted to receive some clarification about the training program he had been cited for not having and about whether the ground control plan was required in April at the time he received the citation (Tr. 54-57).

Considering that a relatively small business is involved, that the violation of section 77.1000 was nonserious in the circumstances, that respondent was negligent for failing to submit the plan to MSHA, and that there was a good faith effort to achieve compliance, a penalty of $50 would have been assessed. Exhibit 1 shows, however, that respondent has violated section 77.1000 on a previous occasion. That tends to offset the operator's claim that he thought a ground control plan was one of the requirements of the new surface mining regulations which were not effective on April 12, 1978, when the instant violation of section 77.1000 was cited. Therefore, the penalty will be increased by $25 to $75 because of respondent's history of a previous violation.

Summary of Assessments and Conclusions

(1) On the basis of all the evidence of record and the foregoing findings of fact, respondent should be assessed the following civil penalties:

Citation No. 123424 4/12/78 § 77.107..............	$ 75.00
Citation No. 123425 4/12/78 § 77.106..............	25.00
Citation No. 123426 4/12/78 § 77.1000.............	75.00
Total Assessments in This Proceeding..........	$ 175.00

(2) Respondent was the operator of the No. 1 Mine at all pertinent times and, as such, is subject to the provisions of the Act and to the regulations promulgated thereunder.

WHEREFORE, it is ordered:

Respondent, within 30 days from the date of this decision, shall pay civil penalties totaling $175.00 as summarized in paragraph (1) above.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

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Larry Cleveland, Esq., Attorney for Black Jack Coal Company, Inc., P.O. Box 595, 314 Wilkinson Street, Frankfort, KY 40602 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 28 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. BARB 79-55-PM A.O. No. 22-00313-05001
v.	:	Artesia Quarry & Plant Mine
UNITED CEMENT COMPANY, Respondent	:	

DECISION

Appearances: Murray A. Battles, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Joe F. Canterbury, Jr., Esq., Smith, Smith, Dunlap & Canterbury, Dallas, Texas, for Respondent.

Before: Judge Cook

I. Procedural Background

On October 24, 1978, the Mine Safety and Health Administration (MSHA) filed a petition for assessment of civil penalty pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1978) (1977 Mine Act), against United Cement Company alleging violations of various sections of the Code of Federal Regulations. All of the subject citations were issued pursuant to section 104(a) of the Act. The Respondent filed its original answer on November 27, 1978, and filed an amended answer on December 14, 1978.

A notice of hearing was issued on February 22, 1979, setting the case for hearing on the merits beginning at 9:30 a.m., May 22, 1979. On March 1, 1979, counsel for the Respondent filed a request for a continuance. An order was issued on March 12, 1979, continuing the hearing to May 31, 1979, in Birmingham, Alabama.

The hearing was held as scheduled. Representatives of both parties were present and participated. A schedule for the submission of posthearing briefs was agreed upon at the conclusion of the hearing. Counsel for the Petitioner stated that he would not file a brief (Tr. 187-188). Respondent's posthearing brief was filed on July 16, 1979.

II. Violations Charged

Citation No. 80420, April 4, 1978, 30 CFR 56.9-87. 1/

Citation No. 80421, April 4, 1978, 30 CFR 56.12-34.

Citation No. 80422, April 4, 1978, 30 CFR 56.16-5.

Citation No. 80423, April 4, 1978, 30 CFR 56.20-3.

Citation No. 80424, April 4, 1978, 30 CFR 56.11-2.

Citation No. 80425, April 4, 1978, 30 CFR 56.14-1.

Citation No. 80426, April 4, 1978, 30 CFR 56.9-12.

III. Evidence Contained in the Record

A. Stipulations

At the commencement of the hearing, the parties entered into stipulations which are set forth in the findings of fact, infra.

B. Witnesses

The Petitioner called as its witness Clyde H. Gilliam, an MSHA inspector on April 4, 1978, and an assessment conference specialist with the Office of Assessments on the date of the hearing.

The Respondent called as its witness Darrell Price, the Respondent's production manager.

C. Exhibits

1. The Petitioner introduced the following exhibits into evidence:

M-1 is a copy of Citation No. 80420, April 4, 1978, 30 CFR 56.9-87.

M-1(a) is a copy of the inspector's statement pertaining to M-1.

M-2 is a copy of Citation No. 80421, April 4, 1978, 30 CFR 56.12-34.

M-2(a) is a copy of the termination of M-2.

M-2(b) is a copy of the inspector's statement pertaining to M-2.

1/ The Petitioner moved, at the close of its case-in-chief, to dismiss the petition as relates to Citation No. 80420. The motion was thereupon granted (Tr. 60-61).

M-3 is a copy of Citation No. 80422, April 4, 1978, 30 CFR 56.16-5.

M-3(a) is a copy of a modification of M-3.

M-3(b) is a copy of the inspector's statement pertaining to M-3.

M-4 is a copy of Citation No. 80423, April 4, 1978, 30 CFR 56.20-3.

M-4(a) is a copy of the inspector's statement pertaining to M-4.

M-5 is a copy of Citation No. 80424, April 4, 1978, 30 CFR 56.11-2.

M-5(a) is a copy of the termination of M-5.

M-5(b) is a copy of the inspector's statement pertaining to M-5.

M-6 is a copy of Citation No. 80425, April 4, 1978, 30 CFR 56.14-1.

M-6(a) is a copy of the inspector's statement pertaining to M-6.

M-7 is a copy of Citation No. 80426, April 4, 1978, 30 CFR 56.9-12.

M-7(a) is a copy of the inspector's statement pertaining to M-7.

2. The Respondent introduced the following exhibits into evidence:

O-1 is a photograph pertaining to Citation No. 80425.

O-2 is a photograph pertaining to Citation No. 80424.

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Facts

A. Stipulations

1. The Administrative Law Judge has jurisdiction of the above-captioned proceeding (Tr. 4).

2. Clyde H. Gilliam was an authorized representative of the Secretary of Labor (Tr. 4).

3. The United Cement Company received copies of each of the subject citations (Tr. 4).

4. The United Cement Company was served a copy of the complaint in the above-captioned proceeding (Tr. 4).

5. The United Cement Company has been served all papers necessary for appearances at the hearing (Tr. 4).

6. There is no history of previous violations (Tr. 5-6).

7. The size of the Artesia Quarry & Plant is rated at approximately 250,000 man-hours per year (Tr. 7).

8. United Cement Company is a wholly-owned subsidiary of Texas Industries (Tr. 7).

9. The size of Texas Industries' combined mining operations (sand, gravel, cement and crushed stone) is rated at approximately 2 million man-hours per year (Tr. 9-10).

10. The size of United Cement Company is rated at approximately 250,000 man-hours per year (Tr. 9-10).

11. The amount of the proposed penalties will not affect the United Cement Company's ability to remain in business (Tr. 10).

B. Occurrence of Violation, Negligence, Gravity and Good Faith

MSHA inspector Clyde H. Gilliam, issued the subject citations on April 4, 1978, during an inspection of the Respondent's Artesia Quarry & Plant (Tr. 14, Exhs. M-1, M-2, M-3, M-4, M-5, M-6, M-7). He was accompanied on the inspection tour by Mr. Darrell Price (Tr. 15-16, 171). According to Inspector Gilliam, Mr. Price was the general mill foreman (Tr. 15-16). However, Mr. Price described himself as the production manager, but stated that his duties as production manager encompassed responsibility for safety at the plant (Tr. 167).

The findings with respect to the individual citations are set forth as follows:

1. Citation No. 80421, April 4, 1978, 30 CFR 56.12-34

The mandatory standard embodied in 30 CFR 56.12-34 provides that "[p]ortable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded."

Inspector Gilliam cited the following "condition or practice" as violating the regulation: "Three light bulbs located approximately 7 feet above the floor did not have a protective guard around them. Should a worker with a metal bar be working below the light bulbs accidentally break the glass, the filament could cause electrical shock" (Exh. M-2).

According to the inspector, the light bulbs were located in a structure used as a conveyor belt transfer station (Tr. 63) that measured approximately 20 feet in length by 20 feet in width (Tr. 70). One of the bulbs was located directly above the transfer point (Tr. 71-72). He testified that the lights were approximately 7 feet above the floor, but indicated that it could have been less (Tr. 69). He did not measure the height, but estimated it visually (Tr. 72). Mr. Price testified that the company measured the height and determined that it was less than 7 feet (Tr. 184).

The 7-foot figure, standing alone, would not be significant absent the so-called "7-foot rule" agreed upon amongst the inspectors during their meetings (Tr. 72-73). By Inspector Gilliam's own admission, 7 feet is "not in the law." He stated that "we" presumably the inspectors, "have to set some arbitrary figure," and indicated that 7 feet "is common sense." (Tr. 72). He stated that the "7-foot rule" is not applicable throughout the nation because "Washington would put out something to that effect and we have never seen nothing to that effect" (Tr. 73). Apparently, the "requirement" was devised after an individual in Georgia, employed by Vulcan Materials, was electrocuted when a bulb broke and his sweaty arm touched the two electrodes. According to the inspector:

> A. Since that time we have made it a point to put guards around light bulbs where it's possible that a man may have a rod in his hands or moving, say around 7-feet or less, where the light bulbs could be broken, and catch the two electrodes.

(Tr. 64).

The testimony of Inspector Gilliam, the description of the "condition or practice" contained in the citation and the comments contained in the document known as the inspector's statement reveal that the possibility of a worker receiving an electrical shock was the sole hazard that the inspector associated with the condition (Exhs. M-2, M-2(b), Tr. 64-66). Neither the documents nor his testimony associate a burn hazard with the condition.

According to the inspector, a metal object being carried by a worker could accidentally strike the bulb, break the glass and make contact with the filaments (Exh. M-2, Tr. 64-65). A sweaty individual could thus be electrocuted, while a dry individual could sustain a shock (Tr. 66).

The testimony as to the derivation of the "7-foot rule," when viewed in the light most favorable to the Petitioner, and the testimony as to the hazard posed by the three unguarded light bulbs, when taken alone and without regard to the nature of the work actually performed in the transfer station, sets forth a plausible basis for finding a violation. However, the question as to whether the regulation has been violated can only be answered by giving due consideration to all of the evidence adduced. It is only through an appraisal of the nature of the actual work performed in the transfer station that a determination can be made as to whether the location of the lights presented a shock hazard to the workers within the meaning of the regulation. 2/

According to the inspector, employees are not assigned to the transfer station on a continuous basis, but work there periodically to perform repair and maintenance functions (Tr. 63, 65, 73). It is not a regular work station, but merely houses some equipment (Tr. 70-71). The inspector stated that the area is visited by workers to remove blockages from the chute (Tr. 65). Pieces of wood or metal were identified as the possible obstructions (Tr. 75-76). He testified that removal of a blockage would definitely require the use of metal rods approximately 1 inch in diameter and 6 feet in length (Tr. 65, 71). The inspector stated that an individual wielding such a tool could accidentally shatter the bulb with the rod (Tr. 65), and achieve contact with the exposed filaments. It was the fear of this type of accident that cause him to issue the citation (Tr. 73-74). However, he admitted that he did not see anyone working in the area, that he could not recall seeing any metal bars in the transfer station (Tr. 71), and that he did not see anyone with a metal bar entering the room (Tr. 74).

2/ At the close of MSHA's case-in-chief, the Respondent moved to dismiss the petition as relates to Citation No. 80421 on [illegible] grounds: First, counsel for the Respondent argued that no evidence had been presented to establish that any employee had ever used any type of metal bar in the transfer station. Second, the Respondent argued that the so-called "7 foot rule" was arrived at arbitrarily and that operators cannot be bound by unwritten requirements.

However, the evidence contained in the record at the time the motion was made established a prima facie case as to the alleged violation and was sufficient to withstand a motion to dismiss. The inspector testified as an expert witness that a metal rod, approximately 6 feet in length and 1 inch in diameter, would be required to remove a blockage from the chute at the transfer point. The existence of such expert testimony supported the inference that unguarded light bulbs located approximately 7 feet above the floor presented a shock hazard. On the basis of this, it was immaterial that an informal "7-foot rule" happened to exist because reliance on it was unnecessary to sustain the finding of a violation. Additionally, the fact that the inspector testified as an expert witness was sufficient at that stage of the case to support an unrebutted opinion that a metal rod of the specified dimensions would be needed to alleviate a blockage.

Accordingly, based on the evidence in the record when the motion was made, the Respondent's motion to dismiss is DENIED.

The sole evidence as to how blockages are actually removed from the chute was provided by Mr. Price, who testified that a blockage would normally be one floor above the level on which the subject light bulbs are located and that picks and shovels would be used to alleviate the blockage (Tr. 178).

Thus, the sum total of all the evidence fails to establish that employees were exposed to an electrical shock hazard of the type alleged in the citation because there was no proof that employees used metal objects in the cited area to remove chute blockages.

Accordingly, I find that the evidence fails to establish a violation of 30 CFR 56.12-34 by a preponderance of the evidence.

2. Citation No. 80422, April 4, 1978, 30 CFR 56.16-5

a. Occurrence of Violation

The mandatory standard codified at 30 CFR 56.16-5 provides: "Mandatory. Compressed and liquid gas cylinders shall be secured in a safe manner." Inspector Gilliam cited the following condition as a violation of the standard: "The oxygen cylinder located in the welding area of the shop was not secured in an upright position by a chain, rope or other means" (Exh. M-3).

The inspector testified that the unsecured cylinder was full of oxygen, and testified as an expert that the pressure inside was approximately 2,000 pounds (Tr. 81). The Respondent offered no rebuttal evidence on this point.

The question of whether a violation occurred is simplified by the Respondent's admission that the cylinder was not secured, but that it should have been secured (Tr. 87).

Accordingly, it is found that a violation of 30 CFR 56.16-5 has been established by a preponderance of the evidence.

b. Negligence of the Operator.

The area in which the violation was observed was classified as a big storage area containing many oxygen cylinders (Tr. 88). Only one of the cylinders was unsecured (Tr. 88). Facilities were provided for tying down the cylinders (Tr. 88), although the witnesses differed as to the type of facilities provided. Inspector Gilliam testified that chains were provided (Tr. 83), while Mr. Price testified that ropes were provided (Tr. 178). The differences in their testimony on this point are immaterial, because both agree that adequate facilities were provided.

The inferences drawn from Inspector Gilliam's testimony indicate that it is more probable than not that an employee had been using the oxygen cylinder, but had replaced it in its proper location without securing it (Tr. 83). The inspector made a general observation to the effect that employees will often leave a cylinder unsecured with the intention of using it again within approximately the next 30 minutes (Tr. 88). However, this general observation is of no assistance in the instant case because the record does not contain any indication as to precisely why the cylinder was not secured.

According to Mr. Price, all employees had been instructed to secure the cylinders (Tr. 178). That this requirement was enforced effectively by the Respondent is attested to by the inspector's interpretation of his own observations as confirming that the Respondent enforced its safety rules (Tr. 91-92). Thus, the evidence in the record is inadequate to establish that the violation was anything other than an isolated occurrence.

Although the inspector testified that the unsecured cylinder was sufficiently conspicuous so as to be observable to an employee working in the area (Tr. 84), the evidence fails to establish that the Respondent or any of the Respondent' s supervisory personnel knew or should have known of the condition. There is no indication that the Respondent had actual knowledge of the condition because the inspector did not know whether the operator, Mr. Price or a foreman actually observed the unsecured cylinder prior to the issuance of the citation (Tr. 90). The sole basis for imputing constructive knowledge to the Respondent is the inspector's statement that a foreman in the area would have known about the condition had it existed for 5 minutes (Tr. 89). However, he admitted not only that it could have existed for substantially less than 5 minutes (Tr. 89-90), but also that it was possible that the foreman was unaware of it (Tr. 89).

Therefore, the evidence is insufficient to establish anything other than the fact that the violation was an isolated occurrence of which the Respondent neither knew nor should have known.

Accordingly, it is found that the Petitioner has failed to establish operator negligence by a preponderance of the evidence.

c. Gravity of the Violation

The unsecured cylinder posed a danger of falling over and hitting the concrete floor, thus damaging the brass, hand-operated valve and causing an oxygen leak (Exh. M-3(b), Tr. 82, 85). The inspector classified an occurrence as probable and noted that one person was exposed to the hazard (Exh. M-3(b)).

The inspector's testimony points to an anticipated fatality as a result of a gas leakage providing sufficient thrust to propel the cylinder as a missile through the walls of the metal building (Tr. 81-84, 85).

Accordingly, it is found that an extremely serious degree of gravity has been established.

d. Good Faith in Attempting Rapid Abatement

The citation was issued at 11 a.m. on April 4, 1978, (Exhs. M-3, M-3(a), Tr. 81). Although the citation was not terminated until 3 p.m. the same day, i.e., 4 hours after issuance, the inspector testified that the condition was abated immediately (Tr. 85-86, 88). In fact, both his testimony and the inspector's statement reveal that the Respondent took extraordinary steps to gain compliance (Tr. 88-89, Exh. M-3(b)).

Accordingly, it is found that the Respondent demonstrated good faith in attempting rapid abatement of the violation.

3. Citation No. 80423, April 4, 1978, 30 CFR 56.20-3

a. Occurrence of Violation

The mandatory standard codified at 30 CFR 56.20-3 provides, in part, as follows: "Mandatory. At all mining operations: (a) Workplaces, passageways, storerooms and service rooms shall be kept clean and orderly." Inspector Gilliam cited the following condition as violating the mandatory standard: "There was loose paper, conduit, empty wire reel and a gallon glass jug in the floor and walkway of the electrical control room for the electro-static precipitator" (Exh. M-4).

The control room was approximately 14 feet long and 7 feet wide (Tr. 171). The inspector testified that it was not a work area (Tr. 107), the inference being that it was frequented periodically by employees recording the readings from the instrument panels (Tr. 102). No one was in the control room when the examination was made (Tr. 102).

According to the inspector, all of the debris was in front of the control panel (Tr. 106). He testified that the wire reel was 36 inches in diameter (Tr. 106), and 12 to 15 inches in height (Tr. 109). It was composed of wood (Tr. 106). The piece of conduit was composed of metal (Tr. 112), and, to the best of his recollection, was approximately 24 to 36 inches in length. The paper volume consisted of 12 to 18 sandwich bags and approximately 6 pieces of newspaper (Tr. 112). Based on these observations, the inspector deduced both that electrical work had been performed in the area (Tr. 111), and that employees had been using the control room as a lunch room (Tr. 113).

Although Mr. Price classified the area as sloppy by company standards (Tr. 172), his testimony differs from the inspector as to both the volume of refuse present and potential safety hazard arising from it. According to Mr. Price, a glass jug, a brown paper bag, a Frito bag and a Coke can were present (Tr. 172). He recalled the piece of metal conduit as being approximately 6 to 8 feet in length and leaning in a corner of the room (Tr. 172), not lying in front of the control panel. He recalled the reel as being approximately 6 to 8 inches in diameter and 8 to 12 inches in length (Tr. 172), which would make it much smaller than the inspector's recollection would indicate.

The resolution of this conflict in the testimony of the witnesses can be accomplished only by assessing their credibility. Although both witnesses were completely honest and forthright in their testimony, the inspector's memory, in light of all the evidence, appears more accurate. Accordingly, I find that Inspector Gilliam's recollection of the nature, composition, extent and location of the refuse in the control room accurately reflects the conditions existing on April 4, 1978. Thus, it is found that the control room was was not being kept clean and orderly as required by 30 CFR 56.20-3.

Accordingly, it is found that a violation of 30 CFR 56.20-3 has been established by a preponderance of the evidence.

b. Negligence of the Operator

Although the inspector testified that the condition would be obvious to a foreman entering the area, he did not know whether a foreman actually saw it (Tr. 107-108). He had no actual knowledge as to when the debris was placed in the room (Tr. 108), an admission with particular significance as to the Respondent's actual or constructive knowledge of the presence of the sandwich bags, newspaper and glass jug. Since the conditions were observed at 1:20 p.m., i.e., shortly after the employees' lunch period (Tr. 108), there is a substantial basis for the inference that those materials had not been present for a sufficient period of time for a foreman to have observed them. In fact, the inspector testified that there was nothing upon which to base an opinion as to operator negligence except the presence of the reel and the conduit (Tr. 110-111). The presence of these two articles dictates the common sense conclusion that people had been working in the area (Tr. 110-111).

However, it is found that the evidence indicates a very minor degree of negligence.

c. Gravity of the Violation

Gravity must be assessed with reference to both the potential tripping hazards and the potential fire hazard posed by the refuse.

The inspector testified that it was unlikely that a person would trip over the reel, but noted that the conduit posed more of a hazard (Tr. 109, 112). The feared injuries, at most, ranged from a sprained ankle to a sprained back (Tr. 101, 103). A back sprain could result in lost workdays (Tr. 103).

No ignition sources were present on the front of the electrical panel, but an ignition source would be presented by a blown cable on the back of the panel (Tr. 113). However, the inspector could not recall any bare cables (Tr. 113).

Both the inspector's statement (Exh. M-4(a)) and the testimony reveal that an occurrence was improbable (Tr. 109), that the injury resulting from the violation could most reasonably be expected to result in no lost workdays, and that one worker was exposed to the hazard.

Accordingly, it is found that the violation was accompanied by moderate gravity.

d. Good Faith in Attempting Rapid Abatement

The Respondent abated the condition in the 40 minutes allotted (Exh. M-4, Tr. 103-104). In fact, the inspector begrudgingly admitted that the Respondent took extraordinary steps to gain compliance (Tr. 109).

Accordingly, it is found that the Respondent demonstrated good faith by attempting rapid abatement of the violation.

4. Citation No. 80424, April 4, 1978, 30 CFR 56.11-2

a. Occurrence of Violation

30 CFR 56.11-2 provides: "Mandatory. Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided."

Inspector Gilliam cited the following condition as violating the mandatory standard: "There was no handrails around the platform nor on the steps at the kiln oxygen analyzer station. The platform was approximately 30 inches above the ground. A worker will visit this station once each shift" (Exh. M-5).

The kiln oxygen analyzer station was described as a small, isolated building atop a raised platform (Tr. 119).

The platform, more accurately characterized as an elevated walkway, was located outside the building. It was approximately 5 to 6 feet in width and approximately 15 feet in length (Tr. 115). It was reached by climbing four steps (Exh. O-2).

The fact that the platform was elevated approximately 30 inches above the ground, in conjunction with the fact that it provided access to the station, renders it an elevated walkway within the meaning of the subject regulation. 3/

3/ In this regard, the existence or nonexistence of the so-called "30-inch regional rule" (Tr. 123-125, 172-173), is immaterial to the finding of a violation. It is unnecessary to decide, assuming that such a rule had been developed informally amongst the inspectors, whether all walkways 30 inches above the ground require handrails per se. In the instant case, reliance on such an informal rule is unnecessary to find a violation because the height of the platform and the nature of its use dictate that handrails should have been present.

Additionally, the fact that toeboards were not provided (Tr. 117, 130) is immaterial since their absence is not alleged in the citation.

Accordingly, it is found that a preponderance of the evidence establishes that the Respondent violated 30 CFR 56.11-2 in that neither the elevated walkway nor the stairway were provided with handrails.

b. Negligence of the Operator

The Respondent's position with respect to operator negligence centers around the Respondent's alleged compliance with Occupational Safety and Health Administration (OSHA) regulations. According to the Respondent, the fact that the plant was constructed according to OSHA specifications demonstrates a lack of operator negligence. (Respondent's Brief, p. 6) (see also, Tr. 173, 183). I am in partial agreement with the tenor of the Respondent's argument, but I am unable to accept the implication that compliance with those standards, at the time the plant was constructed, necessarily requires a per se finding that negligence was not present. The controlling considerations when such a defense is raised are: (1) whether the subject area complied with the OSHA regulations at the time of construction, and (2) the amount of time intervening between the termination of OSHA inspections and the inspection by a Federal mine inspector giving rise to the subject citation. For purposes of the instant case, it is important to bear in mind that an absence of handrails was present on both the elevated walkway and the stairway.

The plant was completed by March of 1974 (Tr. 167). The OSHA standards in effect at that time pertaining to handrails around walkways and stairways, 29 CFR 1910.23(c) and 1910.23(d) (1973), provided:

> (c) Protection of open-sided floors, platforms, and runways. (1) Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a toeboard wherever, beneath the open sides,
>
> (i) Persons can pass,
>
> (ii) There is moving machinery, or
>
> (iii) There is equipment with which falling materials could create a hazard.
>
> (2) Every runway shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides 4 feet or more above floor or ground level. Wherever tools, machine parts, or materials are likely to be used on the runway, a toeboard shall also be provided on each exposed side.

> Runways used exclusively for special purposes (such as oiling, shafting, or filling tank cars) may have the railing on one side omitted where operating conditions necessitate such omission, providing the falling hazard is minimized by using a runway of not less than 18 inches wide. Where persons entering upon runways become thereby exposed to machinery, electrical equipment, or other danger not a falling hazard, additional guarding than is here specified may be essential for protection.
>
> (3) Regardless of height, open-sided floors, walkways, platforms, or runways above or adjacent to dangerous equipment, pickling or galvanizing tanks, degreasing units, and similar hazards shall be guarded with a standard railing and toe board.
>
> (d) Stairway railings and guards. (1) Every flight of stairs having four or more risers shall be equipped with standard stair railings or standard handrails as specified in subdivisions (i) through (v) of this subparagraph, the width of the stair to be measured clear of all obstructions except handrails:
>
> (i) On stairways less than 44 inches wide having both sides enclosed, at least one handrail, preferably on the right side descending.
>
> (ii) On stairways less than 44 inches wide having one side open, at least one stair railing on open side.
>
> (iii) On stairways less than 44 inches wide having both sides open, one stair railing on each side.
>
> (iv) On stairways more than 44 inches wide but less than 88 inches wide, one handrail on each enclosed side and one stair railing on each open side.
>
> (v) On stairways 88 or more inches wide, one handrail on each enclosed side, one stair railing on each open side, and one intermediate stair railing located approximately midway of the width.
>
> (2) Winding stairs shall be equipped with a handrail offset to prevent walking on all portions of the treads having width less than 6 inches. [Emphasis added.]

In addition to the foregoing, the regulations prescribing the construction characteristics of fixed industrial stairs required standard railings "on the open sides of all exposed stairways and stair platforms." 29 CFR 1910.24(h) (1973) (emphasis added). Under 29 CFR 1910.24(b) (1973):

> Fixed stairs shall be provided for access from one structure level to another where operations necessitate regular travel between levels, and for access to operating platforms at any equipment which requires attention routinely during operations. Fixed stairs shall also be provided where access to elevations is daily or at each shift for such purposes as gauging, inspection, regular maintenance, etc., where such work may expose employees to acids, caustics, gases, or other harmful substances, or for which purposes the carrying of tools or equipment by hand is normally required. . . .

As relates to the elevated walkway, the salient provisions of the above-quoted regulation are those requiring railings 4/ around runways 5/ and open sided floors or platforms 6/ 4 feet or more above floor or ground level. It will be recalled that the elevated walkway in the instant case was 30 inches above ground level.

As relates to stairways, the above-quoted regulations require standard stair railings or standard handrails for every flight of stairs having four

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4/ 29 CFR 1910.21 (1973), sets forth the following definitions:

"(a) As used in § 1910.23, unless the context requires otherwise, floor and wall opening, railing and toe board terms shall have the meanings ascribed in this paragraph.

* * * * * * *

(3) Handrail. A single bar or pipe supported on brackets from a wall or partition, as on a stairway or ramp, to furnish persons with a handhold in case of tripping.

* * * * * * *

(6) Standard railing. A vertical barrier erected along exposed edges of a floor opening, wall opening, ramp, platform, or runway to prevent falls of persons.

* * * * * * *

(8) Stair railing. A vertical barrier erected along exposed sides of a stairway to prevent falls of persons."

5/ The term "runway," as used in 29 CFR 1910.23 (1973), is defined at 29 CFR 1910.21(a)(5) (1973), which provides the following:

"Runway. A passageway for persons, elevated above the surrounding floor or ground level, such as a footwalk along shafting or a walkway between buildings."

6/ The term "platform," as used in 29 CFR 1910.23 (1973), is defined at 29 CFR 1910.21(a)(4) (1973), which provides the following:

"Platform. A working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment."

or more risers, 7/ and, as relates to industrial stairs, on the open sides of all exposed stairways and stair platforms. In the instant case, neither standard was complied with.

These standards remained in effect after the termination of OSHA inspections in 1975 (Tr. 183-184). 29 CFR 1910.23(c) and 1910.23(d), 1910.24(b) and 1910.24(h) (1975).

Based on the foregoing, I conclude that the elevated walkway complied with the OSHA regulations in effect both when the plant was completed in 1974 and when OSHA inspections of the plant ceased in 1975. Although permitting this condition to exist during the approximate 3-year time period between 1975 and 1978 would ordinarly constitute gross negligence, the reliance on the previously applicable OSHA requirements during that time period, under the facts presented herein, is sufficient to reduce the degree of negligence demonstrated by the Respondent. Accordingly, it is found that the Respondent demonstrated a high degree of ordinary negligence by failing to provide handrails around the elevated platform.

The stairway, however, presents a different problem because it did not comply with the OSHA requirements either in 1974 or at any time subsequent thereto. Therefore, permitting the condition to exist between 1975 and 1978 constituted gross negligence.

c. Gravity of the Violation

The fact that the walkway was exposed to the elements indicates that rain or other weather conditions could render it slick (Tr. 116). Logically, the same consideration applies to the stairway.

According to the inspector, an individual could back off the walkway, fall 30 inches to the ground and sustain back injuries (Tr. 114-115). However, the inspector classified an occurrence as improbable (Tr. 126, Exh. M-5(b)), noting that how a person fell would determine whether an injury would be sustained (Tr. 125-126). One person would have been exposed to the hazard (Exhs. M-5, M-5(b), Tr. 114).

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fn. 7 (continued)

7/ The regulations contain no definition of the term "riser" applicable to 29 CFR 1910.23 (1973). Guidance as to its meaning under that section is provided by 29 CFR 1910.21(b)(7) (1973), which provides the following:

"(b) As used in § 1910.24, unless the context requires otherwise, fixed industrial stair terms shall have the meaning ascribed in this paragraph."

* * * * * * *

(7) Riser. The upright member of a step situated at the back of a lower tread and near the leading edge of the next higher tread."

Accordingly, it is found that moderate gravity was associated with the violation.

d. Good Faith in Attempting Rapid Abatement

Inspector Gilliam allotted the Respondent 1 day to abate the condition (Tr. 118-119, Exh. M-5). According to Mr. Price, the installation of handrails commenced immediately and was completed the next day (Tr. 174). The citation was terminated when the inspector returned on April 11, 1978 (Tr. 120, Exh. M-5(a)).

Accordingly, it is found that the Respondent demonstrated good faith by attempting rapid abatement of the violation.

5. Citation No. 80425, April 4, 1978, 30 CFR 56.14-1

a. Occurrence of Violation

30 CFR 56.14-1 provides: "Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded."

Inspector Gilliam cited the following condition as violating the standard: "A guard was not installed around the rotating line shaft of the fan for the dust collector located in the bag house. A worker probably walked by the rotating shaft once during a shift" (Exh. M-6).

The Respondent does not contend that a guard was present on the drive shaft. Indeed, it contends in its answer that the condition existed in an isolated area with no employee exposure. Accordingly, it is found that the conditions described in the citation existed as alleged.

In view of the wording of the regulation it must be concluded that exposed moving shafts must be guarded if they may be contacted by persons and cause injury to such persons.

As set forth in Part V(B)(5)(c), infra, addressing gravity, the rotating line shaft could have been contacted by and caused injury to employees of the Respondent.

Accordingly, I conclude that the condition set forth in the citation constituted a violation of 30 CFR 56.14-1.

b. Negligence of the Operator

According to the inspector, anyone operating the equipment or working in the area should have observed the violation (Tr. 136). Although there is no indication as to precisely how long the Respondent had permitted the condition to exist, it can be inferred that the condition had existed since the plant was built.

Mr. Price did, however, state that throughout the plant numerous covers had been placed on pulleys, sprockets and shafts, although he did not know why a cover had not been placed on the subject shaft (Tr. 176). In fact, the chain drive adjacent to the subject shaft was guarded (Tr. 138-140, 177). Inferences drawn from this testimony indicate that at some point in time the Respondent undertook to provide guards for all exposed moving machine parts, but that, for some unexplained reason, the subject shaft was not provided with a guard. Accordingly, I find that the Respondent demonstrated a high degree of ordinary negligence.

c. Gravity of the Violation

The line shaft was mounted between two pillar blocks (Tr. 133, Exh. O-1), and was between 20 to 24 inches above the floor (Tr. 134, 184). The inspector estimated that the shaft rotated at 1,800 revolutions per minute and believed, based on experience, that the machine was powered by a 10-horsepower motor (Tr. 136, 147). Alamite fittings were present on each pillar block to permit lubrication (Tr. 147). According to the inspector, the shaft was accessible to all personnel walking in the area (Tr. 134).

The inspector indicated that a guard would prevent loose clothing from becoming wound around the rotating shaft (Tr. 133, 148), although he testified that for this to occur a burr would have to be present on the shaft (Tr. 136). There is no indication that a burr was present. Although he indicated that workers walking by the shaft were exposed to the hazard (Tr. 133), both the testimony and the inspector's statement reveal that the worker directly exposed to the hazard would be the one lubricating the bearings inside the pillar blocks (Exh. M-6(a), Tr. 140, 147). However, the testimony of Mr. Price reveals an employee would not be required to climb over any obstacles in order to reach the alamite fittings (Tr. 185). It is significant to note that the Respondent permitted lubrication of the equipment without requiring its employees to lock out the equipment (Tr. 176), a practice that could greatly facilitate injuries caused by accidentally starting the machinery.

Since an accident could result in the loss of a limb, the inspector classified the potential injury as permanently disabling (Exh. M-6(a), Tr. 136-137). However, he classified an occurrence as improbable (Exh. M-6(a)).

Accordingly, it is found that a high level of gravity was associated with the violation.

d. Good Faith in Attempting Rapid Abatement

The Respondent immediately commenced fabricating a guard following the issuance of the citation (Tr. 135, 176). Although the inspector gave the Respondent 1 day to abate the violation (Exh. M-6, Tr. 135), the guard was in place, and thus the violation was abated in 1-1/2 hours (Exh. M-6, Tr. 135-136).

Accordingly, it is found that the Respondent demonstrated good faith in attempting rapid abatement.

6. Citation No. 80426, April 4, 1978, 30 CFR 56.9-12

a. Occurrence of Violation

This citation was issued when Inspector Gilliam observed several pieces of refuse on the floor inside the cab of a water truck (Exh. M-7, Tr. 155, 158). The citation (Exh. M-7) describes the condition as follows: "There was loose papers and 2 Coke cans in the floor of the water truck cab. The Coke cans can roll under the brake pedal and prevent the operator from applying the brakes."

The cited standard, 30 CFR 56.9-12, provides: "Mandatory. Cabs of mobile equipment shall be kept free of extraneous materials."

The inspector's testimony dealt mainly with the presence of the two Coca Cola cans (Tr. 155-166). Mr. Price confirmed the presence of the two cans in the truck (Tr. 183).

Accordingly, it is found that a violation of 30 CFR 56.9-12 has been established by a preponderance of the evidence in that extraneous material in the form of two Coca Cola cans were present on the floor of the water truck's cab.

b. Negligence of the Operator

As relates to actual knowledge of the violation, Inspector Gilliam admitted that he did not know whether the Respondent knew of the condition (Tr. 160). The truck was stationary and nobody was in the cab (Tr. 158, 161). In fact, the inspector testified that it would be difficult for the Respondent to check each truck every time the driver got out (Tr. 160). Mr. Price did not know that the cans were present in the truck (Tr. 179).

The inspector's testimony indicates that in order to charge the Respondent with constructive knowledge, the Respondent would have to issue instructions to the drivers to keep the floorboards clear of such refuse and conduct spot inspections to assure that the instructions were being followed (Tr. 157). He admitted, however, that the Respondent would have to rely, to a certain degree, on the drivers following the instructions (Tr. 157). According to Mr. Price, all drivers had been instructed to keep all cabs free of debris (Tr. 179). Both Mr. Price and his supervisor conducted spot checks of the cabs (Tr. 179), presumably to assure that the instructions were being followed. The fact that at least five trucks were on the premises and that only the subject truck had rolling material on the floorboard (Tr. 159), tends to support the proposition that the Respondent effectively enforced its rule relating to debris in truck cabs.

Accordingly, it is found that the Petitioner has failed to establish negligence by a preponderance of the evidence.

c. Gravity of the Violation

The inspector did not recall whether there was a hump in the floorboard or whether the cans were on the driver's side or the passenger's side of the cab (Tr. 155-156). However, he recounted an incident in which an unnamed individual, presumably working for some unidentified company, was killed when a bottle rolled under his brake pedal, preventing him from applying his brakes (Tr. 156).

The "rolling bottle" example is not very material to the gravity of the violation in the instant case because an aluminum Coca Cola can is malleable (Tr. 156), whereas a glass bottle is not. The fact that the ends of a Coco Cola can are stiff (Tr. 156), does not, standing alone, establish that one or two mashed cans present a significant safety hazard of the type envisioned by the inspector (Exhs. M-7, M-7(a)). This is especially true in light of the fact that the cans were under the seat (Tr. 160) and that it was not established that they could roll under the brake.

Of greater significance is the fact that the truck was stationary with nobody in the cab when the violation was cited (Tr. 158, 161). The inspector never saw the truck move and did not know whether it had been operated with the Coke cans inside of it (Tr. 161-162).

In light of this, I am unable to accept the inspector's estimate that the occurrence of an accident was probable (Exh. M-7(a)). Based on all the facts, I must conclude that an occurrence was highly improbable. If, however, an accident did occur, one worker would have been exposed to the hazard and the resulting injury would most reasonably be expected to result in lost workdays or restricted duty (Exh. M-7(a)).

Accordingly, I find that de minimis gravity was associated with the violation.

d. Good Faith in Attempting Rapid Abatement

The inspector gave the Respondent 15 minutes to abate the violation, and abatement was accomplished within the prescribed time period (Exh. M-7, Tr. 163).

Accordingly, it is found that the Respondent demonstrated good faith in attempting rapid abatement.

C. History of Previous Violations

The Respondent has no history of previous violations (Tr. 5-6).

D. Size of the Operator's Business

The United Cement Company is a wholly-owned subsidiary of Texas Industries (Tr. 7). The size of Texas Industries' combined mining operations (sand, gravel, cement and crushed stone) is rated at approximately

2 million man-hours per year (Tr. 9-10). The size of United Cement Company is rated at approximately 250,000 man-hours per year (Tr. 9-10). The size of the Artesia Quarry & Plant is rated at approximately 250,000 man-hours per year (Tr. 7).

E. Effect of Penalty on Operator's Ability to Continue in Business

The parties entered into a stipulation that the amount of the proposed penalties will not affect the United Cement Company's ability to remain in business (Tr. 10). Any penalty proposal computed by the Office of Assessments is immaterial to the issues presented herein because civil penalty proceedings are *de novo* proceedings. The amount of the penalty is determined by the Judge solely with reference to the six statutory criteria contained in section 110 of the Act. In this regard, it has long been recognized that the Judge is empowered to assess penalties greater than those proposed by the Office of Assessments. *Gay Coal Inc.*, 7 IBMA 245, 84 I.D. 99, 1977-1978 OSHD par. 21,662 (1977); *Old Ben Coal Company*, 4 IBMA 198, 82 I.D. 277, 1974-1975 OSHD par. 19,723 (1975); *Buffalo Mining Company*, 2 IBMA 226, 80 I.D. 630, 1973-1974 OSHD par. 16,618 (1973); 29 CFR 2700.27(c) (1978).

However, the Interior Board of Mine Operations Appeals (Board) has held that evidence relating to whether a penalty will affect the ability of the operator to stay in business is within the operator's control, and therefore, there is a presumption that the operator will not be so affected. *Hall Coal Company*, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). I find therefore, that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VI. Conclusions of Law

1. United Cement Company and its Artesia Quarry & Plant have been subject to the provisions of the Federal Mine Safety and Health Act of 1977 at all times relevant to this proceeding.

2. Under the Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. Former MSHA inspector Clyde H. Gilliam was a duly authorized representative of the Secretary of Labor at all times relevant to this proceeding.

4. The violations charged in Citation Nos. 80422 through 80426 are found to have occurred as set forth in Part V, *supra*.

5. The Petitioner has failed to establish the violation charged in Citation No. 80421 by a preponderance of the evidence.

6. All of the conclusions of law set forth in Part V, *supra*, are reaffirmed and incorporated herein.

VII. Proposed Fingings of Fact and Conclusions of Law

The Respondent filed a posthearing brief, the Petitioner did not. Such brief, insofar as it can be considered to have contained proposed findings and conclusions, has been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. Penalty Assessment

Upon consideration of the entire record in these cases and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty is warranted as follows:

Citation No.	Date	30 CFR Standard	Penalty
80422	4/4/78	56.16-5	$ 75.00
80423	4/4/78	56.20-3	40.00
80424	4/4/78	56.11-2	150.00
80425	4/4/78	56.14-1	100.00
80426	4/4/78	56.9-12	25.00
			$390.00

ORDER

Accordingly, the oral determination made at the hearing granting the Petitioner's motion to dismiss the petition as relates to Citation No. 80420 is hereby REAFFIRMED, and the citation is herewith VACATED.

IT IS FURTHER ORDERED that the petition be DISMISSED as relates to Citation No. 80421, and the citation is herewith VACATED.

IT IS FURTHER ORDERED that the Respondent pay civil penalties in the amount of $390 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 28 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. PITT 79-200-P A/O No. 36-02617-03003
v.	:	Solar No. 5 Mine
SOLAR FUEL COMPANY, Respondent	:	

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Eugene E. Fike II, Esq., Somerset, Pennsylvania, for Respondent.

Before: Judge Cook

I. Procedural Background

On May 2, 1979, the Mine Safety and Health Administration (Petitioner) filed a petition for assessment of civil penalty against Solar Fuel Company (Respondent) in the above-captioned proceeding. This petition, filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 820(a) (1978) (1977 Mine Act), alleged two violations of the Code of Federal Regulations. The Respondent filed its answer on May 11, 1979.

On August 27, 1979, the Petitioner filed a motion to amend the petition for assessment of civil penalty as relates to Citation No. 4230, issued on November 8, 1978, to allege a violation of 30 CFR 75.1712-3(a). The petition, as filed, had alleged a violation of 30 CFR 71.402(a). The Petitioner's motion was granted by an order issued on September 12, 1979.

Pursuant to notices issued on October 1, 1979, and October 10, 1979, the hearing was conducted on October 31, 1979, in Somerset, Pennsylvania. Representatives of both parties were present and participated.

At the beginning of the hearing, counsel for the Petitioner moved to dismiss the petition for assessment of civil penalty as relates to

Citation No. 9903735, November 15, 1978, 30 CFR 70.250. This motion was granted. (Tr. 4) 1/

The record was left open for the filing of exhibits by the Petitioner as relates to the size of the operator's business and history of prior violations. Additionally, the Respondent was accorded time to file objections and supplemental exhibits. The Petitioner filed these exhibits (Exhs. M-6, M-6A) on December 17, 1979. The Respondent did not file objections or supplemental exhibits. Exhibits M-6 and M-6A were received in evidence by an order dated January 15, 1980.

The parties waived the filing of briefs. Accordingly, no briefs were filed. 2/

II. Violations Charged

The petition for assessment of civil penalty, as amended, charges the following violations of provisions of the Code of Federal Regulations:

Citation No.	Date	30 CFR Standard
4230	11/8/78	75.1712-3(a)
9903735	11/15/78	70.250

III. Evidence Contained in the Record

A. Stipulations

During the course of the hearing, the parties entered into various stipulations which are set forth in the findings of fact, infra.

1/ Counsel for the Petitioner advanced the following reasons in support of the motion to dismiss:

"The Secretary has agreed to vacate the Citation No. 9,903,735 citing violation 30 CFR 70.250A, I think it is--.250. Basically this case involves what we originally thought was a failure to submit valid dust samples. The facts of this appear to have been that Operator's sample have been sent [sic] in time with the regular mine cycle as required in 70.250. However, in submitting the data cards he inadvertently placed the same Social Security number for two different men. At this point, after discussions between the parties, we determined those factors do not constitute a violation 70.250 [sic] but would perhaps constitute a violation of 70.260 which is the transmission of sample section as opposed to the section requiring individual samples once every nine days which were cited. For those reasons the Secretary has decided, after that knowledge, the Petition will be dismissed" (Tr. 4).

2/ In spite of the waiver, the parties were afforded 2 weeks in which to reconsider their position (Tr. 93).

B. Witnesses

The Petitioner called as its witness Theodore R. Dues, an MSHA inspector.

The Respondent called as its witnesses James L. Custer, the Respondent's manager of safety and health; and William R. Hutchinson, an employee of the Respondent.

C. Exhibits

1. The Petitioner introduced the following exhibits in evidence:

M-1 is a copy of Citation No. 4230, issued on November 8, 1978, originally issued alleging a violation of 30 CFR 71.402(a)

M-2 is a copy of the termination of M-1.

M-4 is a copy of the inspector's statement pertaining to M-1.

M-5 is a copy of a modification of M-1 to reflect a violation of 30 CFR 75.1712-3(a).

M-5A is a modification of M-5.

M-6 is a computer printout compiled by the Office of Assessments listing the history of prior violations for which the Respondent had paid assessments between November 9, 1976, and November 8, 1978.

M-6A is a copy of a controller information report.

2. The Respondent introduced the following exhibit in evidence:

O-16 is a document styled "Record of River and Climatological Observations."

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the 1977 Mine Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

During the course of the hearing, the parties entered into the following stipulations:

1. Solar Fuel Company owns and operates the Solar No. 5 Mine and both are subject to the jurisdiction of the 1977 Mine Act (Tr. 4).

2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the 1977 Mine Act (Tr. 5).

3. Inspector Theodore R. Dues, who issued the subject Citation, was a duly authorized representative of the Secretary of Labor at all times relevant to the proceeding (Tr. 5).

4. The Solar No. 5 Mine produces an average of 80,000 tons of coal annually (Tr. 5).

5. Solar Fuel Company mines an average of 243,000 tons per year (Tr. 5).

6. The assessment of a civil penalty in this proceeding will not affect the operator's ability to do business (Tr. 5).

B. Occurrence of Violation

MSHA inspector Theodore R. Dues conducted a regular health and safety quarterly inspection of the Respondent's Solar No. 5 Mine on November 8, 1978 (Tr. 13, Exh M-1). After leaving the mine office, the inspector obtained his boots and coveralls from his car and proceeded to the change room (Tr. 14). The change room was located in a trailer approximately 300 feet from where the men go to work (Exh. M-1, Tr. 26, 48). The evidence reveals that the change room facility was located in close proximity to a belt used to haul coal from the mine (Tr. 78-79).

The inspector observed that the change room was not clean and orderly (Tr. 14). He thereupon issued the subject citation at 9:15 a.m., describing the conditions observed as follows:

> The bathing facilities, change room and sanitary flush toilet facilities that were located in a trailer mobile home on the surface was not being maintained in a clean and sanitary condition in that coal dust, spit on the wall, flush toilet not clean and an odors [sic] in the shower and toilet facilities.

The petition for assessment of civil penalty, as amended, alleges that the cited condition constitutes a violation of mandatory standard 30 CFR 75.1712-3(a), which provides that:

> All bathing facilities, change rooms, and sanitary toilet facilities shall be provided with adequate light, heat, and ventilation so as to maintain a comfortable air temperature and to minimize the accumulation of moisture and odors, and such facilities shall be maintained in a clean and sanitary condition.

According to the inspector, coal dust was on the sink, bathroom facilities, bench, floor and lockers (Tr. 14-15). The best available evidence reveals that the coal dust on the floor was mixed with water. Some of it was partially dry (Tr. 30, 34, 44,). The inspector observed a sufficient accumulation of coal dust on the bathroom sink to permit a person to write his name in it (Tr. 15, 31-33). The inspector further testified that tobacco or snuff spit was present at numerous locations on the wall near the benches (Tr. 14-15, 27-28). In addition, he testified that he detected the odor of urine in the toilet area (Tr. 15, 22).

The Respondent's witnesses, Messrs. Custer and Hutchinson, recalled observing several spots, described as discolorations, on the wall above the trash receptacle. Although neither witness could positively identify the composition of the spots, Mr. Hutchinson described their physical appearance as "splatters" (Tr. 46, 81). Inspector Dues, during his rebuttal testimony, reasserted that the material was spit (Tr. 90-91). In light of the inspector's positive identification, I find that spit was present on the wall as described in his testimony during the Petitioner's case-in-chief.

The Respondent's witnesses attempted to establish the odor detected by the inspector as emanating from the water supply and the soiled mine clothing. According to the Respondent's witnesses, the water supply at the mine contains sulphur, imparting to it a slight odor similar to that of rotten eggs (Tr. 61-63, 80). In addition, Mr. Custer testified that any odors present would be accentuated by the heat in the trailer (Tr. 63). The inspector's rebuttal testimony convincingly establishes a urine odor in the cited area. He was aware of the problem posed by the mineral content of the water and did not cite the Respondent for the stains on the toilet and bathing facilities caused by the sulphur. He reasserted that he detected the odor of urine and testified that he did not detect the "rotten egg smell" described by the Respondent's witnesses (Tr. 89-91).

Accordingly, I find that the conditions cited by the inspector constituted a violation of 30 CFR 75.1712-3(a). 3/

3/ The testimony establishing the presence of cigarette butts in the cited area (Tr. 14-15) is not deemed material to the issue of whether a violation occurred since they are not alleged in the petition for assessment of civil penalty.

C. Gravity of the Violation

The inspector classified the violation as serious because of the health hazard posed (Tr. 22-23), while Mr. Custer, a former MSHA inspector (Tr. 63), did not believe the cited area to be in an unsanitary condition (Tr. 64). However, it is significant to note, in assessing Mr. Custer's testimony on this point, that he was unable to identify the composition of the material on the wall and that he did not testify to detecting the odor of urine.

The best available evidence indicates that no miners were in the cited area when the inspector observed the condition, but that approximately 10 miners had been in the area shortly prior to his arrival (Tr. 16, 26-27, 47). No evidence was presented as to the probability of an occurrence.

Accordingly, I conclude that a slight amount of gravity was associated with the violation.

D. Negligence of the Operator

The inspector's opinion that the condition had existed for over a week (Tr. 16) was rebutted in part by the testimony of Mr. Hutchinson. Mr. Hutchinson testified that he cleaned the cited area between 7 and 8 p.m. on November 7, 1978, in accordance with his customary practice (Tr. 77-78). The cleaning consisted of mopping, sweeping and wiping (Tr. 77). In addition, he testified that he cleaned the sink, bathing and toilet facilities. However, there is evidence indicating that the cleaning job was less than thorough (Tr. 78, 85). Specifically, he testified that he did not remove the splatter marks observed by him from the wall (Tr. 85).

However, above and beyond this consideration, the record clearly reveals that substantial coal dust accumulations were a recurrent problem in the area, and that this state of affairs should have been known by the Respondent. According to Mr. Hutchinson, coal dust accumulates quickly in the cited area due to its proximity to a belt leading from the mine to a bin (Tr. 78-79). He further testified that an appreciable amount of coal dust could have accumulated over a 6- to 12-hour period because "I could clean it like tonight and tomorrow morning you could go in and write your name in dust" (Tr. 81). The fact that the facility was used by one section foreman on each shift (Tr. 47) indicates that the Respondent should have known of this recurrent problem.

Accordingly, I conclude that the Respondent demonstrated ordinary negligence.

E. Good Faith in Attempting Rapid Abatement

Abatement was accomplished in the time allotted by the inspector (Exhs. M-1, M-2, M-5A). Accordingly, I conclude that the Respondent demonstrated good faith in attempting rapid abatement.

F. History of Previous Violations

The history of previous violations at the Solar No. 5 Mine for which the Respondent had paid assessments between November 9, 1976, and November 8, 1978, is summarized as follows:

30 CFR Standard	Year 1 11/9/76 - 11/8/77	Year 2 11/9/77 - 11/8/78	Total
All Sections	9	10	19
75.1712-3(a)	0	0	0

(Exh. M-6).

G. Appropriateness of the Penalty to the Size of the Operator's Business

Gulf and Western Industries, Inc. (Gulf and Western), is the controller of Solar Fuel Company (Exh. M-6A). Exhibit M-6A reveals that all of Gulf and Western's coal production in 1978 and 1979 was attributable to Solar Fuel Company. The parties stipulated that Solar Fuel Company mines an average of 243,00 tons of coal annually, and that the Solar No. 5 Mine produces an average of 80,000 tons of coal annually (Tr. 5).

H. Effect on Operator's Ability to Continue in Business

The parties stipulated that the assessment of a civil penalty in this proceeding will not affect the operator's ability to do business (Tr. 5). Furthermore, the Interior Board of Mine Operations Appeals has held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Hall Coal Company, 1 IBMA 175, 79 I. D. 668, 1971-1973 OSHD par. 15, 380 (1972). Therefore, I find that a penalty otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VI. Conclusions of Law

1. Solar Fuel Company and its Solar No. 5 Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of and the parties to this proceeding.

3. MSHA inspector Theodore R. Dues was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the citations which are the subject matter of this proceeding.

4. The conditions set forth in Citation No. 4230, issued on November 8, 1978, are found to have occurred and to have constituted a violation of 30 CFR 75.1712-3(a).

5. The oral determination at the hearing granting the Petitioner's motion to withdraw the petition for assessment of civil penalty as relates to Citation No. 9903735, November 15, 1978, 30 CFR 70.250 is AFFIRMED.

6. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

VII. Penalty Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty is warranted as follows:

Citation No.	Date	30 CFR Standard	Penalty
4230	11/8/78	75.1712-3(a)	$40

ORDER

Respondent is ORDERED to pay the civil penalty in the amount of $40 assessed in this proceeding within 30 days of the date of this decision.

IT IS FURTHER ORDERED that the petition for assessment of civil penalty be, and hereby is, DISMISSED as relates to Citation No. 9903735, November 15, 1978, 30 CFR 70.250.

John F. Cook
Administrative Law Judge

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Administrator for Coal Mine Safety and Health, U.S. Department of Labor

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OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 28 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner
v.

C.C.C.-POMPEY COAL COMPANY, INC.,
Respondent

Civil Penalty Proceeding

Docket Nos.	Assessment Control Nos.
PIKE 79-19-P	15-09727-03002
PIKE 79-111-P	15-09727-03005
PIKE 79-112-P	15-09727-03006 V
PIKE 79-117-P	15-09727-03003 V
PIKE 79-125-P	15-09727-03004 V
KENT 79-116	15-09727-03007 V

No. 3 Mine

DECISION

Appearances: Robert A. Cohen, Esq., and Michael C. Bolden, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Garred O. Cline, Esq., Pikeville, Kentucky, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued June 7, 1979, as amended on June 26, 1979, and August 29, 1979, a hearing in the above-entitled proceeding was held on September 25, 26, and 27, 1979, in Pikeville, Kentucky, under Section 105(d) of the Federal Mine Safety and Health Act of 1977.

The consolidated proceeding involves six Petitions for Assessment of Civil Penalty filed by the Mine Safety and Health Administration. The tabulation below shows the dates on which the Petitions were filed and lists the number of violations alleged in each Petition:

Docket Numbers	Dates of Filing	Number of Alleged Violations
PIKE 79-19-P	November 14, 1978	20
PIKE 79-111-P	March 13, 1979	3
PIKE 79-112-P	March 13, 1979	1
PIKE 79-117-P	March 19, 1979	1
PIKE 79-125-P	March 22, 1979	11
KENT 79-116	May 30, 1979	1
Total Alleged Violations		37

Counsel for the parties entered into the following stipulations (Tr. 5-6):

(1) Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

(2) The inspectors who wrote the notices of violation, orders of withdrawal, and citations involved in this proceeding were authorized representatives of the Secretary of the Interior or the Secretary of Labor at the time such documents were written.

(3) At the time the alleged violations were cited, respondent's No. 3 Mine employed between 20 and 40 miners and produced approximately 60,000 tons of coal per year.

(4) Exhibit 1 in this proceeding shows that respondent has paid penalties for 64 previous violations at the No. 3 Mine.

The Summary of Assessments given at the end of this decision shows that seven of the 37 violations alleged by MSHA in this consolidated proceeding were the subject of evidentiary presentations by the parties and that the remaining 30 alleged violations were the subject of a settlement agreement entered into by the parties. I rendered bench decisions with respect to the seven contested violations. The bench decisions will first be reproduced in this decision as they appear in the transcript. Subsequently, this decision will summarize the reasons advanced by counsel in support of their request that their settlement agreement be approved with respect to the remaining 30 alleged violations.

The Contested Violations

Docket No. PIKE 79-19-P

Notice No. 2 FIJ (7-8) 2/28/77 § 75.1710

Upon completion of introduction of evidence by the parties, I rendered the bench decision quoted below with respect to Notice No. 2 FIJ (Tr. 198-199):

> The former Board of Mine Operations Appeals held in several cases -- Buffalo Mining Company, 2 IBMA 226, at Page 259 (1973) -- that if the materials needed for abatement are not available, no Notice of Violation should be written; and the Board held the same thing in two other cases -- Associated Drilling, Incorporated, 3 IBMA 164, at Page 173 (1974); and Itmann Coal Company, 4 IBMA 61 (1975).
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> The Board also held in P and P Coal Company, 6 IBMA 86 (1976) that an administrative law judge cannot raise this impossibility of performance defense himself, and I do not think I have raised it here.

> But it does seem to me Mr. Cline's testimony, through both Mr. Chaneys, do[es] show that this Acme 100 was unfit and unqualified for installation of canopies in 1977 -- that is February 26, 1977, when the Notice was written.
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> And I realize and recognize the inspectors had a job to do and they were applying this Section 75.1710 to all mines in an effort to get these canopies put on them.
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> And as Mr. Cline pointed out, they did require a lot of companies to get into the designing of canopies, to make their own, and some of the more affluent companies such as the Pittston Company did actually redesign shuttlecars; and in one case I had, they spent three million dollars redesigning equipment so that canopies could be put on them; but I do not think C.C.C.-Pompey Coal Company is large enough to have done a job such as that.
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> So, I think the evidence here clearly shows it was an impossibility of performance on this Acme 100 roof drill; consequently, I am going to grant Mr. Cline's motion to dismiss the petition in Docket Number PIKE 79-19-P, insofar as it seeks assessment of penalty with respect to Notice Number 2 FIJ dated February 28, 1977.

Notice No. 5 BHT (7-23) 5/11/77 § 75.1710

Upon completion of introduction of evidence by the parties with respect to the above Notice, I rendered the following bench decision (Tr. 236-238):

> This particular Notice is much more difficult to deal with because it is a fact it was terminated with the company acquiring a usable canopy, if you consider the conditions Mr. Chaney talked about as being usable.
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> But it is also a fact it took them over a year after the Notice was originally issued before they were able to get a canopy that would work. I recognize on the day the Notice was issued, as Mr. Chaney also recognized, the height was forty-eight inches; and that perhaps if he can keep it at forty-eight inches all the time and keep a level floor all the time, he might be able to accommodate this canopy fairly well.
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> But as he pointed out, it is not quite that easy; it fluctuates, both in height and floor condition, and is still giving them an awful lot of trouble.
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> And one of the factors I have to give considerable weight to is the fact Mr. Tackett said that on May 11, 1977,

> he had not found other mines that were using a Galis 300 with canopies on them any more than Mr. Chaney was succeeding with that.
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> And as Mr. Chaney pointed out, he did try to get a canopy on this machine about six months before the Notice was issued, which shows an unusual amount of effort and certainly more so than if he had waited around until he was cited and then tried to get one.
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> So, I think this situation, even though there are many factors about it that weigh heavily, the fact a violation perhaps -- the Notice, rather, should have been issued in order to protect miners and apparently did ultimately succeed in getting them the protection, the fact remains there is a certain amount of danger associated with these canopies, and it is still a debatable situation; but that is neither here nor there.
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> The important and only thing I have to consider today is whether this is truly a situation where the materials needed for the canopy were available on the date the Notice was issued, and I think the preponderance of the evidence shows that the equipment was not available; and therefore, I am going to grant Mr. Cline's motion with respect to Notice Number 5 BHT dated May 11, 1977, and dismiss the petition in Docket Number PIKE 79-19-P with respect to that particular Notice.

Upon completion of the introduction of evidence by the parties, I rendered the following bench decision with respect to the alleged violations which are discussed in the bench decision (Tr. 602-616):

> There are four general criteria as to which I can make a general finding and those findings will be applicable for all of the remaining alleged violations unless there is some specific evidence persuading me there was not a good faith effort to achieve rapid compliance.
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> The evidence submitted by stipulation indicates as to the size of Respondent's business that it produced sixty thousand tons per year and if you assume two hundred fifty working days a year that would amount to about two hundred forty tons per day.
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> Yesterday Mr. Cline referred to production of three hundred tons per day in some of his questions so I assume the daily production is somewhere between two hundred forty tons and three hundred tons. I would conclude from that that

Respondent operates a relatively small business, so the penalties that I assess will be in a relatively low magnitude under the criteri[on] of the size of Respondent's business.

Mr. Cline indicated on Tuesday he did not intend to introduce evidence regarding Respondent's ability to pay penalties; therefore, in the absence of any evidence, I find payment of penalties will not cause Respondent to discontinue in business.

I am finding there was a normal good faith effort to achieve rapid compliance with respect to all the alleged violations. I recognize that Inspector Steele did not think there had been a good faith effort to achieve rapid compliance with respect to some of his citations and orders, but he based that primarily on the fact that the alleged violations were not abated until May 25, and it so happens that a lot of notices or citations were issued on the same day, May 12, and all of them had the effect of closing down the mine.

The Respondent worked on all of them simultaneously and finished cleaning up the mine and getting ready for inspection by May 25 so I don't think you could make a finding of failure to abate any one of the alleged violations at a given point between May 12 and May 25 would have shown a lack of good faith effort to achieve rapid compliance.

So as to all the citations and orders that have been issued up 'til now I find a good faith effort to achieve rapid compliance unless we have evidence of a contrary nature at some subsequent point in which case I would give that criteri[on] additional consideration at that time.

As to the history of previous violations, I shall consider that criteri[on] individually when the penalty is assessed. Of course, I shall also give individual consideration to the remaining two criteria of negligence and gravity.

Turning then to the order in which the evidence was received [in] Docket No. [PIKE] 79-19-P, the first one of those was Citation No. 66814 issued on May 25, 1978, by Inspector Murphy alleging a violation of Section 75.400. The alleged violation consisted of float coal dust extending from the portal to Spad No. 605 which was a distance of about eight hundred feet.

The float coal dust existed in an entry which had been designated as an escapeway and while it was an intake escapeway on May 25, 1978, when the citation was written, the escapeway had previously been a return entry because in the inspector's opinion, based upon a review of the mine map, the float coal dust had accumulated in the entry during the time the entry had been used as a return which would have made the accumulation form in a period prior to about May 8 to May 12, 1978, when the flow of air was reversed in the escapeway.

The inspector did not take any samples because the float coal dust was paper thin and defied the taking of samples. Moreover, the former Board of Mine Operations Appeals held in the Kaiser Steel case at 3 IBMA 489 (1974), that it is unnecessary to take samples to support a violation of Section 75.400.

The former [B]oard did establish some very strict criteria which must be shown or proven by an inspector in order to make a prima facie case with respect to an alleged violation of Section 75.400. The [B]oard's opinion on that matter was issued in Old Ben Coal Company, 8 IBMA 98, where at pages 114 to 115 the [B]oard said that a prima facie case requires the following steps in proof: First, an accumulation of combustible material existed in the active workings or on electrical equipment in the active workings of a coal mine; two, that the coal mine operator was aware, or by exercise of due diligence and concern for the safety of the miners, should have been aware of the existence of such accumulation; and three, that the operator failed to clean up such accumulation or failed to undertake to clean it up within a reasonable time after discovery or within a reasonable time after discovery should have been made.

There is a close question between Inspector Murphy and Mr. Harold Chaney with respect to whether the gray appearance of the escapeway was dark enough to be considered a float coal dust accumulation because both witnesses stated the appearance of the entry was gray.

Mr. Chaney claims the gray appearance was the result of dampness and after the entry was rock dusted to abate the citation it regained its gray appearance a short time after the rock dusting when the new coat of rock dust became as wet as the old coat of rock dust.

That evidence requires me to make a credibility determination between the two witnesses and I'm finding in favor of Inspector Murphy because both Mr. Harold Chaney and his brother praised the fair and objective manner in which Inspector Murphy made his inspection and I don't -- and I mean all inspections -- and I don't believe Inspector

Murphy would have written a citation as to float coal dust without making a very careful and thorough examination which convinced him an accumulation of float coal dust existed.

Therefore, I find that the accumulation of float coal dust existed and I find Mr. Chaney either knew about it or should have known about it if he had made as diligent an examination of the escapeway as Inspector Murphy did.

Inspector Murphy believed that Respondent had failed to clean up the accumulation within a reasonable time because he wrote the citation on May 25, 1978, and he believed the float coal dust had existed since about May 8, 1978, when the air flow was reversed from the return to intake air.

Mr. Harold Chaney said the air flow was reversed on May 12, 1978, and he stated there was no float coal dust in the escapeway on May 12, 1978. Nevertheless, I have found the float coal dust existed on May 25, 1978, so it would have had to have accumulated after May 12, 1978, under Mr. Chaney's view of the facts.

In the Old Ben case the [B]oard stated that the operator knew exactly when the accumulation there involved occurred and knew when the cleanup was begun and how many men were being used to do the cleanup. In this case, Mr. Harold Chaney did not know when the escapeway was last rock dusted; therefore, I find he lacked the necessary facts to overcome MSHA's prima facie case that violation of Section 75.400 occurred.

I find that the violation was only moderately serious because Inspector Murphy cited no ignition hazards and stated that an explosion at the face of some size would be required for propagation of an explosion down the escapeway. There was normal negligence involved because the gray color of the float coal dust might have been a reason for Mr. Chaney to omit having a new coat of rock dust applied; therefore, a penalty of one hundred dollars ($100) will be assessed for this violation of Section 75.400.

Exhibit 1 shows Respondent violated Section 75.400 twice in 1976, and eight times in 1977. That is a very adverse trend in the numbers of violations of Section 75.400; therefore, the penalty will be increased by one hundred dollars ($100) to two hundred dollars ($200) because of Respondent's unfavorable history of previous violations.

Also in Docket No. PIKE 79-19-P there is an alleged violation of Section 75.1704 alleged by Inspector Murphy in

Citation No. 66815 dated May 25, 1978. Section 75.1704 requires an escapeway [to] be maintained in a safe condition.

Inspector Murphy stated a two hundred foot portion of the same escapeway inby Spad No. 605 mentioned in the previous citation was unsafe because the roof needed scaling in several locations and additional timbers needed to be installed to maintain a travelway six feet wide.

Mr. Chaney stated the two hundred foot portion had just been added to the escapeway to correct another alleged violation but the two hundred foot portion had been marked as an escapeway and was required to be in a safe condition.

Inspector Murphy believed that this violation was only potentially serious and I find it was moderately serious and involved normal negligence; therefore, a penalty of one hundred dollars ($100) will be assessed for this violation of Section 75.1704.

Exhibit 1 shows Respondent has violated this section on one previous occasion. It is important that escapeways be maintained in a safe condition so the penalty will be increased by twenty-five dollars ($25) to one hundred twenty-five dollars ($125) because of Respondent's history of a previous violation.

The petition for assessment of civil penalty filed in Docket No. PIKE 79-117-P seeks assessment of civil penalty with respect to Citation No. 66866 dated May 12, 1978, involving an alleged violation of Section 75.301 because the velocity of air was too low to be measured with an anemometer.

There was a great deal of discussion in the record about the way that Inspector Steele conducted himself during the inspection made on May 12, 1978, but Respondent has presented no witness who denies that the air velocity was below nine thousand cubic feet per minute when Inspector Steele issued Citation No. 66866.

Mr. Harold Chaney found a velocity of more than nine thousand cubic feet per minute when he made his preshift examination prior to 6:00 a.m. but Mr. Chaney agrees some of the required curtains were down when he next examined the section and since he did not take an air reading at the subsequent time when Inspector Steele issued Citation No. 66866 on May 12, 1978, I believe the evidence shows the velocity was very low at the time Inspector Steele made his examination.

While all witnesses agree no coal was being mined on May 12, 1978, all witnesses did agree that the coal was being loaded on May 12 and the ventilation, methane, and dust control plan requires that a velocity of nine thousand cubic feet of air be maintained at the last open crosscut if coal is being mined, cut or loaded; therefore, I find a violation of Section 75.301 occurred.

The preponderance of the evidence shows the violation was only moderately serious because the low air velocity had not existed for more than one or two hours as it occurred between the preshift examination and the writing of the citation at 8:30 a.m.

The low air velocity was caused by heavy rain which caused the belt on the fan to slip and turn more slowly than was normal and by the fact that the scoop operator knocked down curtains when they began cleaning up the coal on the section at the beginning of their shift. The section foreman was considerably negligent in failing to maintain his air velocity or check with Mr. Chaney if he could not determine why he lacked the required air velocity.

Inspector Steele did not observe a tremendous amount of dust in suspension in the section at the time the citation was written and since the violation had existed for only one or two hours there was not a great likelihood of an explosion from methane accumulation since no methane was detected by Inspector Steele and none has ever been detected in the No. 3 Mine.

Since there was a high degree of negligence a penalty of three hundred dollars ($300) is warranted. Exhibit 1 shows no previous violations of Section 75.301; therefore, the penalty will not be increased under the criteri[on] of history of previous violations.

There was only one alleged violation in that docket [PIKE 79-117-P]. The next docket that was considered is Docket No. PIKE 79-125-P. In that one, the first one that was considered was Order No. 66869 which was written by Inspector Steele on May 12, 1978, at 9:00 a.m. citing a violation of Section 75.400.

Here again the [B]oard's Old Ben opinion at 8 IBMA 98 must be considered. All witnesses, namely Inspector Steele, Inspector Ratliff, and both Mr. Harold Chaney and Mr. Ronald Chaney, agreed there was some coal dust, oil and grease on the S&S scoop cited in Inspector Steele's order.

There is disagreement among the witnesses as to whether the accumulations were great enough to warrant the issuance of an order but Inspector Ratliff believed it would take -- or would have taken about a week for the oil to accumulate to the extent he observed it when he was checking permissibility.

But he did not express an opinion as to the time that would have been required for the coal dust to accumulate. Nevertheless, the preponderance of the evidence supports my finding, and I find an accumulation of combustible materials existed on the scoop.

The next step in building a prima facie case is barely made out by the evidence but I find the operator knew or should have known that the accumulation existed. The third step in the prima facie case, however, is not supported by Inspector Steele because he stated during cross-examination that he could not put a time limit on the period the accumulation had existed and he stated he did not ask when the scoop had last been cleaned.

The [B]oard in the Old Ben case reversed the finding that a violation of Section 75.400 had occurred primarily because of the Inspector's failure to make an investigation as to whether the operator had failed to clean up the accumulation within a reasonable time after the accumulation occurred.

It should be noted that Inspector Murphy in the previous violation that I found as to Section 75.400 knew an exact time when the float coal dust in the escapeway should have been removed and re-rock dusted but here Inspector Steele did not have the necessary facts to support all steps of the prima facie case required by the [B]oard's Old Ben opinion; therefore, I find that MSHA failed to prove that a violation of Section 75.400 occurred with respect to Order No. 66869 and that its petition for assessment of civil penalty in Docket No. PIKE 79-125-P should be dismissed to the extent that a penalty is sought with respect to the violation of Section 75.400 [1] alleged in Order No. 66869 dated May 12, 1978.

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[1] On December 12, 1979, the Commission issued its decision in MSHA v. Old Ben Coal Co., Docket No. VINC 74-11, 79-12-4, in which it held that the mere existence of a combustible accumulation could be considered a violation of Section 75.400. Since my bench decision was rendered on September 27, 1979, and was final insofar as the parties were concerned,

Also in Docket No. PIKE 79-125-P Order No. 66870 dated May 12, 1978, cited Respondent for a violation of Section 75.316 because Respondent had failed to install stoppings in five open crosscuts. Inspector Steele's allegation that five stoppings were missing was strongly challenged by Respondent's witness, Mr. Harold Chaney, who said that stoppings were required in only four crosscuts because the section had only advanced four crosscuts to the right of the main heading.

The confusion as to the disagreement between Mr. Chaney and Inspector Steele was resolved and Inspector Steele numbered the affected crosscuts on Exhibit 4 or the mine map. Mr. Chaney, thereafter, said Inspector Steele was including a crosscut inby the feeder which Mr. Chaney did not consider to be a part of the [working] section cited in Order No. 66870.

Inspector Steele agreed the stoppings which were installed at the time Mr. Chaney made his preshift examination would have been in compliance with the ventilation plan or Exhibit 3, since Mr. Chaney had obtained an air velocity of nine thousand cubic feet a minute or more at the last open crosscut. Eventually, both Mr. Chaney and Inspector Steele agreed that enough stoppings had been knocked down by the scoop operator when he was cleaning up to reduce the required number of stoppings below those required to be maintained to have a proper separation of the return from the intake entries; therefore, I find a violation of Section 75.316 occurred.

Here again, the preponderance of the evidence shows that the violation existed for only about three hours, so the miners were not exposed for long to excessive respirable dust or a possible explosion, which would have been remote in any event since no methane was detected on May 12, 1978, or has ever been [detected] in the No. 3 Mine. Again I find the section foreman was very negligent in failing to see th[at] proper ventilation was maintained and a penalty of three hundred dollars ($300) is warranted.

Exhibit 1 shows Respondent has previously violated Section 75.316 on two prior occasions; therefore, the penalty will be increased by fifty dollars ($50) to three hundred

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fn. 1 (continued)
I do not believe that my decision should be amended to change my finding with respect to the violation of Section 75.400 alleged in Order No. 66869 because the Board's Old Ben opinion was the applicable law at the time my bench decision was rendered.

fifty dollars ($350) under the criteri[on] of Respondent's history of previous violations.

Also in Docket No. PIKE 79-125-P Order No. 66872 dated May 12, 1978, cited Respondent for a violation of Section 75.200 because Respondent had failed to comply with its roof control plan or Exhibit 3 by driving seven entries for three crosscuts inby and two crosscuts outby Survey Station No. 1708 to a width of from twenty-one feet, ten inches to twenty-three feet, one inch, whereas the roof control plan permits a width of only twenty feet.

Mr. Harold Chaney challeged that order, that is No. 66872, as having correctly cited a violation of Section 75.200 because he stated a provision on page 8 of Respondent's roof control plan allows Respondent to drive an entry up to four feet in excess of the normal twenty foot width, provided an extra roof bolt is installed, so as to prevent a spacing of roof bolts greater than four feet from the rib.

Since Inspector Steele did not allege he had checked the roof bolts at the wide places cited in his order and found spaces -- and therefore did not know whether spaces existed at the roof bolts greater than four feet [from the ribs], Mr. Chaney correctly contended no violation of the roof control plan had been proven.

I find Mr. Chaney's point is well taken. The provision on page 8 of the roof control plan would permit varying entry widths of up to four feet so long as an extra roof bolt is installed to prevent a roof bolt spacing from the rib of more than four feet.

Inspector Steele stated another inspector had examined the spacing of the roof bolts and that he did not personally make that a part of his order. I find that Inspector Steele's failure to consider the roof bolt spacing as a simultaneous part of the citation of a violation of the roof control plan is a fatal flaw in his Order No. 66872 and prevents me from finding that a violation of Section 75.200 is proven.

Therefore, MSHA's petition for assessment of civil penalty in Docket No. PIKE 79-125-P will be dismissed to the extent it seeks assessment of a civil penalty for a violation of Section 75.200 with respect to Order No. 66872 dated May 12, 1978.

Docket No. PIKE 79-111-P

Order No. 70617 8/14/78 §§ 75.603, 75.604, and 75.517

Upon completion of the introduction of evidence by the parties, I rendered the following bench decision with respect to Order No. 70617 (Tr. 627-632):

> The order that Mr. Cline has been talking about is No. 70617 issued August 14, 1978, alleging violations of Sections 75.603, 75.604 and 75.517. Considering those in the order they are set forth in Order No. 70617 I shall discuss the alleged violation of 75.603 first.
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> Inspector Murphy alleged there were four temporary splices in the trailing cable to a Galis 300 roof bolting machine, whereas only one temporary splice is permitted in a twenty-four period. Mr. Harold Chaney, Respondent's witness, stated he had added an exten[s]ion to the pre-existing trailing cable to the roof bolting machine and that the exten[s]ion was obtained by removing it from an unused Acme roof bolter on the surface.
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> Mr. Chaney connected the exten[s]ion to the pre-existing cable by using a temporary splice. Mr. Chaney said there were some taped places on the trailing cable but as far as he knew the only temporary splice in the cable was the one he used for connection of the cable to the pre-existing cable.
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> Inspector Murphy's rebuttal testimony shows that he specifically found the spliced conductor in the cable and since Inspector Murphy examined the trailing cable with greater care than Mr. Chaney I find that his testimony supports a finding that the four temporary splices existed and at the time I wrote that language, I did not have before me Mr. Cline's offer of proof on behalf of witness Cantrell.
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> I cannot give Mr. Cantrell's proposed statement as much weight as I do Inspector Murphy's statement because Inspector Murphy was here and [was] cross-examined in great detail about all these matters. I am unwilling to find that an offer of proof is sufficient to rebut Inspector Murphy's testimony on this point, particularly in light of general testimony in this record to the effect that Mr. Murphy is a fair and objective inspector.
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> So with respect to the temporary splices I find the violation was only moderately serious because the four temporary splices were apparently in satisfactory condition inasmuch as

no bare wires were cited by Inspector Murphy when he examined them; the shock and fire hazard associated with the temporary splices was therefore only potential.

The negligence associated with this violation, however, was of a high degree because Mr. Chaney, Mr. Harold Chaney, used a temporary splice without making certain that other temporary splices were nonexist[e]nt.

He says there were taped places but he was not sure whether there were splices in those tapes or not. While Mr. Chaney intended to remove the temporary splice within the twenty-four period so as to avoid a violation of Section 75.603, it is a fact that he used the temporary splice to save the cost of buying a permanent splicing kit and to avoid stopping production for from one to one half of one shift because he expected to pull out of [the area here involved] after roof bolts had been installed to abate another violation written at a previous time.

Mr. Ronald Chaney, Respondent's president, was aware the trailing cable had been lengthened but he believed any defects in the cable were nonserious because they existed near the nip station where miners would be unlikely to walk unless a fuse should need to be replaced. It is haste and taking unnecessary risks which produce fatalities in coal mines.

While neither of Respondent's witnesses believed the extension of the cable exposed the miners to serious injury, it is a fact that the extension could have resulted in the electrocution of a miner who might have come to the nip station to replace a fuse which might have blown because of the use of a different size cable or defects in the old piece of cable used to make the extension; therefore, I believe the moderate seriousness and high degree of negligence involved in this violation of Section 75.603 warrants a penalty of five hundred dollars ($500).

I would assess more if a relatively small operator were not involved. Exhibit 1 does not indicate that Respondent has previously violated Section 75.603, so the penalty will not be increased under the criterion of history of previous violations.

Passing on to the alleged violation of Section 75.604 which deals with permanent splices and a bare wire in one and worn places in others, there's no dispute about the fact the trailing cable had worn permanent splices in it. As both Inspector Murphy and Mr. Harold Chaney agreed, the cable contained permanent splices and Mr. Chaney agreed that some of the permanent splices were worn and needed to be repaired.

While Mr. Chaney stated he did not see a bare wire exposed in any permanent splice, Mr. Chaney did not examine the splices as carefully as Inspector Murphy and therefore I find Inspector Murphy's testimony supports the finding [that] an exposed bare wire existed in one of the splices.

Since an exposed wire is capable of causing electrocution I find that the violation was very serious. Mr. Chaney was very negligent in failing to repair the permanent splices; therefore, a penalty of seven hundred fifty dollars ($750) will be assessed for the violation of Section 75.604.

Exhibit 1 shows no history of previous violations with respect to Section 75.604 and therefore there will be no increase in the penalty under that criteri[on].

As to Section 75.517, Inspector Murphy's testimony also supports a finding that two damaged places existed in the trailing cable. Since one of the damaged places had a bare wire exposed in it, the violation of Section 75.517 was equally serious and involved a similar degree of negligence.

For those reasons a penalty of seven hundred fifty dollars ($750) will be assessed for the violation of Section 75.517. Exhibit 1 indicates that Respondent has not previously violated Section 75.517 so the penalty will not be increased under that criteri[on].

That completes the decision on all the cases or alleged violations as to which we had evidence. I assume that you're ready to proceed to the matters that were settled?

Settlement Agreements

Docket No. PIKE 79-19-P

Citation No. 66877 dated May 12, 1978, alleged that respondent had violated Section 75.200 because loose roof bolts had been observed in an area starting at the portal and extending inby to the 001 Section. The citation was subsequently changed to Withdrawal Order No. 66813 when Inspector Murphy returned on May 25, 1978, and found that the alleged violation had not been abated. The Assessment Office proposed a penalty of $760 for this alleged violation and respondent has agreed to pay a penalty of $400. MSHA's counsel stated that he had agreed to accept the reduced amount because the operator's contention is that in some places the roof had been doubly supported by additional roof bolts. Also there was no allegation made that the roof itself was bad, other than around the roof bolt area, and there is doubt as to the number of roof bolts involved in this particular violation. Those facts warrant a reduction in the penalty. Additionally, even though the operator had been issued a withdrawal order for failure to abate on May 25, 1978, MSHA's counsel thought that some consideration should be given to the fact that the operator's mine had been closed by numerous outstanding withdrawal orders and the operator was having some difficulty in abating all of the orders simultaneously (Tr. 633).

Citation No. 67701 dated May 12, 1978, alleged that respondent had violated Section 75.514 because suitable connectors were not being used in approximately 40 splices installed in 200 feet of feeder wire. Wire rope clamps were being used for connectors and a dispute arose over the types of clamps that can be installed in feeder wire. MSHA's counsel stated that in some instances some of the clamps that had been installed as connectors had been acceptable by MSHA in the past. The Assessment Office proposed a penalty of $920 and respondent has agreed to pay a penalty of $500. MSHA's counsel stated that he had agreed to accept the reduced amount because even though it was a serious violation, the small size of the operator should be considered. Also the fact that the operator failed to abate in a timely fashion was again the result of the fact that he was under numerous withdrawal orders and may have been hindered from abating all alleged violations as rapidly as he would have preferred to have corrected them (Tr. 634-635).

Citation No. 67702 dated May 12, 1978, alleged that respondent had violated section 75.517 in that the 300-volt DC feeder wire was uninsulated in approximately 40 places along its entire length from the drift up to the face of the 001 Section. MSHA's counsel noted that some of this wire was located in places not frequently traveled by the miners and that factor reduced the miners' likelihood of exposure to danger associated with the uninsulated places. The Assessment Office proposed a penalty of $920 and respondent has agreed to pay a penalty of $500. The penalty was increased substantially by the Assessment Office because a subsequent withdrawawl order was issued on May 25 for failure of the operator to abate the condition, but, again, the operator was trying to cope with numerous withdrawal orders and was hindered from abating the citation as quickly as the inspector seemed to think it should have been abated (Tr. 636).

Citation No. 67703 dated May 12, 1978, alleged that respondent had violated Section 75.516 in that the DC feeder wire was not properly supported on insulators and was in contact with the roof or mine floor along its entire length from the portal to the working section. MSHA's counsel stated that this was a serious violation since the principal danger was the possibility of a fire. The operator claims that there were areas where the wire was properly supported. The Assessment Office proposed a penalty of $920 and respondent has agreed to pay $500. MSHA's counsel stated that the Assessment Office increased the proposed penalty substantially because a withdrawal order had been issued. MSHA's counsel said that the operator was hampered from supporting the feeder wire by obligations resulting from other orders and that he believed a penalty of $500 was fair and reasonable in this instance (Tr. 637-638).

Citation No. 67704 dated May 12, 1978, alleged that respondent had violated Section 75.512 because the switch used to control the No. 2 belt drive from the tailpiece was not properly designed in that a bare wire and nail were being used to make contact on the 230-volt DC control circuit. The Assessment Office considered that the violation involved gross negligence, that it was very serious, and proposed a penalty of $690 which respondent has agreed to pay in full (Tr. 638-639).

Citation Nos. 67706 and 67708 were both dated May 12, 1978, and both alleged that respondent violated Section 75.523-2. Both citations alleged violations because the deenergization devices, or panic bars, installed on two scoops were inoperative. The scoops were used to load coal in the 001 Section. Respondent's and MSHA's counsel agreed that panic bars do break down on a fairly regular basis. MSHA's counsel stated that there was no way to determine how long the panic bars had been inoperative prior to the inspection. The operator claims that the panic bars had been checked before the inspection and found to be working. Therefore, the operator contends that he was unaware of their inoperative condition. The Assessment Office proposed a penalty of $195 for each of the alleged violations and respondent has agreed to pay $125 for each alleged violation (Tr. 640-641).

Citation No. 67707 dated May 12, 1978, alleged that respondent had violated Section 75.503 by not maintaining the scoop so that it was in a permissible condition. Counsel for MSHA stated that the lack of permissibility should have been found during an electrical inspection, but he noted that no methane had been detected and he believed that the lack of methane should be considered as a factor to reduce the gravity of the alleged violation. The Assessment Office proposed a penalty of $255 and respondent has agreed to pay $200 (Tr. 641-642).

Citation No. 67709 dated May 12, 1978, alleged that respondent had violated Section 75.503 because an S & S scoop was not maintained in a permissible condition. That condition, when considered with the fact that no methane was found, reduced the gravity of the alleged violation sufficiently, in the opinion of MSHA's counsel, to justify accepting respondent's offer to pay a penalty of $150 instead of the penalty of $170 proposed by the Assessment Office (Tr. 642).

Citation No. 67710 dated May 12, 1978, alleged that respondent had violated Section 75.313-1 because the methane monitors on two scoops were inoperative. The operator stated that the panic bars were not operating either because an electrical problem had developed on the scoops which the operator claims prevented his knowing of the inoperative monitors. Respondent alleges that it endeavors to keep the monitors in good condition even though no methane has been found on the working section. The Assessment

Office proposed a penalty of $195 and respondent has agreed to pay $150 for the alleged violation (Tr. 643).

Citation No. 67711 dated May 12, 1978, alleged that respondent had violated Section 75.518 because no short circuit protection had been provided for the 30-horsepower belt drive motor. The violation produced a fire and shock hazard. The Assessment Office proposed a penalty of $655 and respondent has agreed to pay $500 for the alleged violation. Here, again, the Assessment Office increased the penalty substantially because a withdrawal order was subsequently issued. MSHA's counsel stated that the operator was confronted with abating a large number of alleged violations and could not work on all of them simultaneously. In such circumstances, MSHA's counsel stated that he believed the acceptance of a reduced penalty was justified (Tr. 643-644).

Citation Nos. 67712 and 67713 dated May 12, 1978, alleged that respondent had violated Sections 75.515 and 75.701, respectively. Both of the alleged violations deal with electrical connections for the belt-drive motor. MSHA's counsel said that the first citation deals with the fact that suitable cable fittings were not provided where the power cable entered the metal frame of the motor. In the second citation, the alleged violation was that respondent had failed to provide a frame ground. Both alleged violations produced possible shock and fire hazards. Again, the Assessment Office increased the penalties substantially because withdrawal orders were subsequently issued for failure of the operator to abate within the time originally given by the inspector. The Assessment Office proposed a penalty of $760 for the alleged violation of Section 75.515 and respondent has agreed to pay $500. MSHA's counsel was agreeable to accepting the reduced penalty because no worn places existed on the wires for which proper fittings had not been provided. For the alleged violation of Section 75.701, the Assessment Office proposed a penalty of $920 and MSHA's counsel believed that respondent's agreement to pay $500 was reasonable in view of the problems respondent was having in correcting a large number of alleged violations (Tr. 644-645).

Citation No. 67728 dated May 12, 1978, alleged that respondent had violated Section 75.1722 because a guard had not been provided for the chain-type control between the drive motor and the speed reducer for the No. 2 belt drive. MSHA's counsel stated that two protective guards are required in this area. The operator was engaged in repairing one guard and another had been broken during the shift. In the opinion of MSHA's counsel, those circumstances reduced the degree of negligence and warranted accepting a reduced penalty of $150 instead of the penalty of $240 proposed by the Assessment Office (Tr. 646-647).

Citation No. 67716 dated May 25, 1978, alleged that respondent had violated Section 75.200 by failing to maintain a required apron over the portal to prevent rocks from falling from the highwall on the men as they went in and out of the mine. MSHA's counsel stated that the supports had been dislodged and were not serving the purpose for which they had been installed.

The Assessment Office proposed a penalty of $305 and respondent has agreed to pay a penalty of $200. The operator claimed that a scoop had knocked the supports down on the same morning during which the inspector made his examination. MSHA's counsel stated that the short period of time between the knocking down of the supports and the time the citation was written supported a finding of a low degree of negligence and justified accepting the reduced penalty (Tr. 647-648).

Citation No. 67715 dated May 25, 1978, alleged that respondent had violated Section 75.202 because overhanging brows were present in the working section and in the outby haulage roadways. The overhanging brows had not been scaled or supported. Counsel for MSHA said that when an overhanging brow is present, it either has to be taken down or supported and that MSHA feels this was a serious violation. In the opinion of MSHA's counsel, roof brows have been the cause of both deaths and serious injuries in coal mines and the operator should have been aware of the condition. The operator claims that a lot of the brows were in crosscut areas where they would not normally have exposed miners to danger. The Assessment Office proposed a penalty of $920 and respondent has agreed to pay $600. MSHA's counsel believed that the reduced penalty was warranted since the Assessment Office had increased the penalty largely on the basis that a withdrawal order had subsequently been issued. As has previously been stated, a large number of citations had been issued within a relatively short period of time. Respondent's mine had ceased to produce coal while the alleged violations were being corrected, but respondent was unable to abate all of the violations simultaneously (Tr. 648-649).

Docket No. PIKE 79-125-P

The Petition for Assessment of Civil Penalty in Docket No. PIKE 79-125-P seeks assessment of civil penalties for 11 alleged violations. Three of those violations were alleged in Order Nos. 66869, 66870, and 66872 which have already been considered in my bench decision, supra (Tr. 613-616).

Order No. 66873 dated May 12, 1978, alleged that respondent had violated Section 75.1704 by failing to prevent the accumulation of water to a depth of 30 inches in the intake escapeway. The Assessment Office proposed a penalty of $600 and respondent has agreed to pay $350. Counsel for MSHA stated that there was some evidence that the operator had attempted to provide another escapeway around this area. The violation occurred during a rainy period when water could accumulate rapidly. MSHA's counsel believed that the circumstances justified acceptance of a reduced penalty (Tr. 650).

Order No. 66874 dated May 12, 1978, alleged that respondent had violated Section 77.1104 in that the diesel generator was not maintained in a safe operating condition because oil and grease had accumulated on the generator and oil was standing in puddles under it. Counsel for MSHA stated that this particular piece of equipment was on the surface and that its location had the effect of reducing the danger of fire. The operator showed good faith in abating the condition rapidly. The Assessment Office proposed a penalty of $400 and respondent has agreed to pay $200. MSHA's counsel believed that good reasons had been given for accepting a reduced penalty in view of the fact that respondent claimed that some of the puddles consisted of water and that the oil was engine-lubricating oil rather than diesel fuel. The engine oil was less ignitable than fuel oil would have been (Tr. 650-652).

Order No. 66875 dated May 12, 1978, alleged that respondent had violated Section 77.404 in that the front-end loader was not being maintained in a safe operating condition because its windshield was cracked, it was not equipped with a fire extinguisher, and its back-up alarm was not operative. MSHA's counsel said that the mitigating circumstances were that the loader was not being used at the time of inspection and the fact that it was a surface violation made it less serious than if the equipment had been used in the underground mine. The Assessment Office proposed a penalty of $400 and respondent has agreed to pay $250 which MSHA's counsel believed to be appropriate for the reason stated above (Tr. 652-653).

Order No. 66876 dated May 12, 1978, alleged that respondent had violated Section 77.202 in not maintaining the belt drive located on the surface in a safe operating condition because oil and float coal dust had been permitted to accumulate on the drive. MSHA's counsel stated that the Assessment Office had proposed a penalty of $400, but he had concluded that no assessment should be made because this particular alleged violation was a duplication of another citation written by a different inspector. The operator has agreed to pay the full penalty proposed by the Assessment Office with respect to the overlapping citation and MSHA's counsel said that since the same belt drive was involved in both citations, he believed that fairness justified assessment of only one penalty. Therefore, MSHA's counsel requested that he be permitted to withdraw the Petition for Assessment of Civil Penalty in Docket No. PIKE 79-125-P to the extent that it alleged a violation of Section 77.202 with respect to Order No. 66876. That request is hereinafter granted in the order accompanying this decision (Tr. 654-655).

Order No. 67705 dated May 12, 1978, alleged that respondent had violated Section 75.701 because the cutting machine and roof-bolting machine had not been properly grounded. MSHA's counsel said that an effort to ground the machines had been made, but the inspector was not convinced that the machines had been adequately grounded. The Assessment Office proposed a penalty of $400 and respondent has agreed to pay $300. MSHA's counsel stated that he believed a reduced penalty was justified in light of the operator's strong contention that the machines had been adequately grounded (Tr. 655-656).

Order No. 67726 dated May 12, 1978, alleged that respondent had violated Section 75.400 by allowing excessive amounts of loose coal, coal dust, and float coal dust to accumulate in the conveyor belt entry and connecting crosscuts. The accumulation ranged from 1/8 inch to 10 inches in depth. The conveyor belt is 900 feet long. The Assessment Office believed that the violation involved a high degree of negligence and gravity and proposed a penalty of $1,100 which respondent has agreed to pay in full (Tr. 656-657).

Order No. 67727 dated May 12, 1978, alleged that respondent had violated Section 75.1100-1 by having removed a joint in the waterline running parallel to Nos. 1 and 2 conveyor belts with the result that the conveyor belts did not have adequate fire protection. It was the contention of the operator that the waterlines had been temporarily disconnected so that a motor on the belt drive could be fixed. It was the operator's intention to restore the waterlines to an operable condition as soon as the repairs had been completed, but the inspector observed the condition before the necessary work had been done. The Assessment Office proposed a penalty of $900 and respondent has agreed to pay $500. It was the opinion of MSHA's counsel that a reduced penalty of $500 was adequate when the extenuating circumstances are taken into consideration because there is nothing to show that a fire was likely to occur at the time the waterline was out of service (Tr. 656-658).

Order No. 67729 dated May 12, 1978, alleged that respondent had violated Section 75.200 because approximately 50 roof bolts had not been installed in accordance with the roof-control plan inasmuch as the bolts were required to be installed on 4-foot centers, whereas they had been installed from 4-1/2 to 6 feet apart. The Assessment Office correctly found that a high degree of negligence and gravity were involved and proposed a penalty of $500 which respondent has agreed to pay in full (Tr. 658).

Docket No. KENT 79-116

Order No. 66871 dated May 12, 1978, alleged that respondent had violated Section 75.403 because no rock dust had been applied for a distance of three crosscuts beginning at a point two crosscuts inby Survey Station No. 1708. Two samples were taken by the inspector of the area cited in his order and the analyses of the samples showed the incombustibility content of one sample to be 35 percent while the incombustibility content of the other sample was 79 percent. No explanation exists for the fact that one sample showed no violation while the other did. MSHA's counsel stated that the equivocal nature of the evidence justified acceptance of a reduced penalty of $400 instead of the penalty of $800 proposed by the Assessment Office (Tr. 658-659).

Docket No. PIKE 79-112-P

Order No. 66868 dated May 12, 1978, alleged that respondent had violated Section 75.400 in that the operator had allowed combustible material consisting of loose coal and float coal dust to accumulate on the ribs and floor in depths ranging from 1 inch to 24 inches. The accumulations started two crosscuts outby Survey Station No. 1708 in the No. 5 entry and extended inby for three crosscuts. The area included Nos. 1 through 7 entries and connecting crosscuts. The Assessment Office proposed a penalty of $600 and respondent has agreed to pay the proposed penalty in full.

I find that counsel for respondent and MSHA gave satisfactory reasons for the penalties agreed upon in their settlement conference and that the settlement agreements hereinbefore discussed should be accepted.

Summary of Assessments and Conclusions

(1) Based on all the evidence of record and the aforesaid findings of fact, or the parties' settlement agreements, the following civil penalties should be assessed:

Docket No. PIKE 79-19-P

Citation No. 66814	5/25/78	§ 75.400	(Contested)	$ 200.00
Citation No. 66815	5/25/78	§ 75.1704	(Contested)	125.00
Citation No. 66877	5/12/78	§ 75.200	(Settled)	400.00
Citation No. 67701	5/12/78	§ 75.514	(Settled)	500.00
Citation No. 67702	5/12/78	§ 75.517	(Settled)	500.00
Citation No. 67703	5/12/78	§ 75.516	(Settled)	500.00
Citation No. 67704	5/12/78	§ 75.512	(Settled)	690.00
Citation No. 67706	5/12/78	§ 75.523-2	(Settled)	125.00
Citation No. 67707	5/12/78	§ 75.503	(Settled)	200.00
Citation No. 67708	5/12/78	§ 75.523-2	(Settled)	125.00
Citation No. 67709	5/12/78	§ 75.503	(Settled)	150.00
Citation No. 67710	5/12/78	§ 75.313-1	(Settled)	150.00
Citation No. 67711	5/12/78	§ 75.518	(Settled)	500.00
Citation No. 67712	5/12/78	§ 75.515	(Settled)	500.00
Citation No. 67713	5/12/78	§ 75.701	(Settled)	500.00
Citation No. 67715	5/25/78	§ 75.202	(Settled)	600.00
Citation No. 67716	5/25/78	§ 75.200	(Settled)	200.00
Citation No. 67728	5/12/78	§ 75.1722	(Settled)	150.00
Total Settlement and Contested Penalties in Docket No. PIKE 79-19-P				$6,115.00

Docket No. PIKE 79-111-P

Order No. 70617	8/14/78	§ 75.603	(Contested)	$ 500.00
Order No. 70617	8/14/78	§ 75.604	(Contested)	750.00
Order No. 70617	8/14/78	§ 75.517	(Contested)	750.00
Total Penalties in Docket No. PIKE 79-111-P				$2,000.00

Docket No. PIKE 79-112-P

Order No. 66868	5/12/78	§ 75.400	(Settled)	$ 600.00
Total Settlement Penalty in Docket No. PIKE 79-112-P				$ 600.00

Docket No. KENT 79-116

Order No. 66871 5/12/78 § 75.403 ...... (Settled)	$ 400.00
Total Settlement Penalty in Docket No. KENT 79-116	$ 400.00

Docket No. PIKE 79-117-P

Citation No. 66866 5/12/78 § 75.301 .... (Contested)	$ 300.00
Total Penalty in Docket No. PIKE 79-117-P	300.00

Docket No. PIKE 79-125-P

Order No. 66870 5/12/78 § 75.316 .... (Contested)	$ 350.00
Order No. 66873 5/12/78 § 75.1704 ...... (Settled)	350.00
Order No. 66874 5/12/78 § 77.1104 ...... (Settled)	200.00
Order No. 66875 5/12/78 § 77.404 .... (Settled)	250.00
Order No. 67705 5/12/78 § 75.701 .... (Settled)	300.00
Order No. 67726 5/12/78 § 75.400 .... (Settled)	1,100.00
Order No. 67727 5/12/78 § 75.1100-1 .... (Settled)	500.00
Order No. 67729 5/12/78 § 75.200 .... (Settled)	500.00
Total Settlement and Contested Penalties in Docket No. PIKE 79-125-P	$3,550.00
Total Settlement and Contested Penalties in This Proceeding	$12,965.00

(2) Respondent was the operator of the No. 3 Mine at all pertinent times and, as such, is subject to the provisions of the Act and to the regulations promulgated thereunder.

(3) For the reason given in my bench decision, supra (Tr. 198-199, and Tr. 236-238), the Petition for Assessment of Civil Penalty in Docket No. PIKE 79-19-P, should be dismissed to the extent that penalties are sought for violations of Section 75.1710 cited in Notice Nos. 2 FIJ (7-8) dated February 28, 1977, and 5 BHT (7-23) dated June 6, 1977.

(4) For the reason given in my bench decision, supra (Tr. 616), the Petition for Assessment of Civil Penalty in Docket No. PIKE 79-125-P, should be dismissed to the extent that a penalty is sought for a violation of Section 75.200 cited in Order No. 66872 dated May 12, 1978.

(5) For the reason given in my decision at page 20, supra, the request of MSHA's counsel to withdraw the Petition for Assessment of Civil Penalty in Docket No. PIKE 79-125-P, should be granted to the extent that a penalty is sought for a violation of Section 77.202 cited in Order No. 66876 dated May 12, 1978.

WHEREFORE, it is ordered:

(A) The parties' request for approval of settlement is granted and the settlement agreements submitted in this proceeding are approved.

(B) Pursuant to the parties' settlement agreement and the bench decision rendered in this proceeding, respondent shall, within 30 days from the date of this decision, pay civil penalties totaling $12,965.00 as set forth in paragraph (1) above.

(C) MSHA's Petitions for Assessment of Civil Penalty filed in Docket Nos. PIKE 79-19-P and PIKE 79-125-P are dismissed to the extent specified in paragraphs (3) and (4) above.

(D) MSHA's request to withdraw the Petition for Assessment of Civil Penalty in Docket No. PIKE 79-125-P is granted and the Petition is deemed to have been withdrawn to the extent described in paragraph (5) above.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 29 1980

RIO ALGOM CORPORATION, Applicant	:	Application for Review
v.	:	Docket No. DENV 79-347
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order No. 336661 January 29, 1979 Lisbon Mine

DECISION

Appearances: F. Alan Fletcher, Esq., Parson, Behle & Latimer, Salt Lake City, Utah, for Applicant;
James Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Stewart

PROCEDURAL BACKGROUND

The above-captioned application for review was brought by Applicant, Rio Algom Corporation, pursuant to section 107(e) of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act). Applicant sought review of an order issued under section 107(a) of the Act.

The hearing in this matter was held on September 5, 1979, in Moab, Utah. Applicant called two witnesses. Respondent called one witness and introduced one exhibit. At the conclusion of the hearing, the parties chose to make oral argument and waived their right to submit posthearing briefs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Inspector Ronald Beason issued the subject order in this case, Order No. 336661, on January 29, 1979, in the course of an investigation of an unintentional roof fall at Applicant's Lisbon Mine. The inspector issued the order pursuant to section 107(a) of the Act and alleged a violation of 30 CFR 57.3-22. He described the relevant condition or practice as follows:

> The 13 north drift 90 ft. from the 4th east pillar had excessive weight. The 8 X 8 timbered sets were breaking the cap on the second cap had a 3-1/4" gap in the center of the

cap. The plates on 25 split bolts in this area were stripped. The 13 north & 19th west, a length of 37 feet, had 5-8 x 8 sets of timber which had broken caps. The 13 north and 7th West intersection had caved above the anchorage. This was the full width of the drift and extended 25 feet in 13 north. The mechanical bolts were pulled and several split bolts broken. The plates on the split bolts from 7th west to 4 west along the 13th north haulage were stripped and the area taking excessive weight.

The order of withdrawal encompassed the following areas: 13th North, 90 feet from 4th East pillar; 13 North 19 West for 37 feet; 13 North and 7th West; 13 North from 7th West to 4th East.

The unintentional roof fall which gave rise to Inspector Beason's investigation occurred on January 24, 1979, at 12:30 p.m. in the 18th North, 8th West drift. Approximately 40 feet of roof collapsed after breaking above the anchorage point of its roof bolts. The fall had occurred near a shop area in which a number of employees were eating lunch, but it did not result in injury or death. Mr. Pearson, Applicant's Safety Supervisor, testified that the main haulage and travelway to the area was blocked because of the fall. Only the emergency access, designated as the 8C manway, remained open.

Mervyn Lawton, the manager and president of Rio Algom Corporation as well as the supervisor of the Libson Mine, was in the area of the fall at the time of its occurrence. He instructed one crew of miners to remove equipment from the area. A second crew was instructed to continue driving an entryway in an effort to open a new entrance into that working area. It was estimated by Mr. Lawton that two additional blasts would be necessary to complete the entryway. All miners were withdrawn from the area on the following day, January 25, 1979, at 10 a.m., when it became evident that more than two blasts were needed to accomplish the breakthrough.

All supervisory personnel were instructed to keep people out of the area and a sign reading "No admittance, keep out" was placed on the haulage level entering the 8C manway. This finding was based on the testimony of both Mr. Pearson and Mr. Lawton, notwithstanding the inspector's testimony that he did not recall seeing a sign posting the area as closed.

The fall which occurred on January 24 was not reported to MSHA until January 28. On the following day, Inspector Beason conducted his inspection of the area. He examined the first roof fall and discovered a second fall at 13th North, 7th West. This second fall extended 25 feet for the entire width of the entryway. As with the first fall, this break occurred above the anchorage point of the roof bolts. The inspector observed both mechanical roof bolts and split sets in the debris. Prior to the inspector's investigation, mine management had been unaware of the second roof fall. It had occurred after the company had removed its miners from the area.

In the 13th North, 4th East drift, the inspector observed timbers taking an inordinate amount of weight. These timbers measured 8 inches by 8 inches and had been placed 6 feet apart for a distance of 60 feet. Caps on approximately 10 of these timbers had been smashed by the weight of the roof. Some of these caps had stress cracks and had been deflected downward. The inspector estimated that 25 split sets in the area had been stripped of their plates.

The inspector observed compression of caps and stripped plates in the 13th North, 6th West drift. He noted that there were five sets of affected timbers. These timbers also measured 8 inches by 8 inches and had been placed at 6-foot intervals. One post had split and stress cracks were observed in some of the caps. Plates had been stripped from some split sets and some of the mechanical bolts had been pulled.

The inspector also observed a number of split sets from which plates had been stripped in the 13th North, 7th West to 4th West drifts.

Witnesses for Applicant generally corroborated the inspector's testimony relating to the conditions in those areas included in the order. Their testimony established that, for the most part, the conditions observed on January 29 did not exist on January 25 when the mining crew had been removed from the area. In particular, the roof fall had not yet occurred in the 13th North, 7th West drift. Mr. Pearson, Applicant's safety supervisor, was in the affected areas on Thursday morning. He stated that fewer plates had been stripped from split sets than Inspector Beason noted later and that he he did not observe signs of unusual compression of timber or caps.

All of the witnesses agreed that the roof falls, the stripped plates and the compression of caps were evidence of ground movement in the area. This movement occurred while the 13th North drift was being driven because the area had been developed on an incline. The inspector believed that retreat mining in the general area created additional pressure on the roof in the affected area. Retreat mining was ongoing approximately 100 feet straight through a pillar on the uphill side of the original roof fall.

"Imminent danger" has been defined in section 3(j) of the Act to mean the "existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." The Interior Board of Mine Operations Appeals, with the affirmance of the Fourth and Seventh Circuits, has stated that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F.2d 25, 32-33 (7th Cir. 1975), aff'g, 3 IBMA 252 (1974), Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 504 F.2d 741, 745 (7th Cir. 1974), aff'g, 2 IBMA 197, 212 (1973); Eastern Associated Coal Co. v. Interior Board of Mine Operations Appeals, 491 F.2d 277, 278 (4th Cir. 1974), aff'g, 2 IBMA 128, 136 (1973). In that case the Board enumerated the following test to be used in determining whether an immient danger existed:

> Would a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment but not necessarily immediately? Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 504 F.2d 741, 743-4, (7th Cir. 1974), 2 IBMA 197, 212 (1973).

The conditions in the Lisbon Mine constituted an imminent danger under all of the criteria that should be considered in making the determination. Inspector Beason's finding was reasonable and proper. The conditions which he observed clearly indicated that ground movement had occurred recently in the area. There was nothing to suggest that this movement had ceased or that the extant roof support was sufficient. In a period of 5 to 6 days two unintentional roof falls had occurred and increased strain on the roof support system was pervasively evident. During this time, roof conditions had changed markedly. Moreover, only one route existed which allowed exit from the area. Finally, the areas encompassed by the order were ones in which miners would have worked regularly. If normal mining operations were permitted to proceed, the conditions could reasonably have been expected to cause death or serious harm. The order was properly issued under section 107(a) of the Act.

The issuance of a 107(a) order of withdrawal was appropriate, notwithstanding the Applicant's prior voluntary removal of miners from the areas covered by the order. The purpose of such an order is not only to cause the withdrawal of miners, but to ensure that they remain out of the affected areas until the condition is corrected. The Valley Coal Company, 1 IBMA 243, 248 (1972).

In issuing Order No. 336661 which alleged that an imminent danger existed, the inspector also noted that there was a violation of 30 CFR 57.3-22. He testified that he believed the fourth sentence of the standard had been violated. This sentence reads as follows: Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary." Toby Pearson, the safety supervisor at Rio Algom Mine, testified that he conducted such inspections along the haulageways and travelways in the affected area prior to the time that men were withdrawn. He also stated that at that time there was no need to scale or support in the areas encompassed by the order. The Interior Board of Mine Operations Appeals, however, has noted "whether a condition or practice constitutes a violation which was not intended to be and is not a controlling issue in a proceeding to review an imminent danger withdrawal order." Freeman Coal Mining Corporation, 2 IBMA 197, 207-208 (1973). A finding need not be made, therefore, as to whether a violation of section 57.3-22 existed. Such a finding would not be determinative of the issues in this case.

ORDER

Accordingly, it is ORDERED that the operator's application for review is DISMISSED.

Forrest E Stewart

Forrest E. Stewart
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 29 1980

SUNBEAM COAL CORPORATION,
Contestant
v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent

Contests of Citations

Docket No. PITT 79-210

Citation No. 229432
February 22, 1979

Docket No. PITT 79-211

Citation No. 229433
February 22, 1979

Docket No. PITT 79-212

Citation No. 229434
February 22, 1979

Docket No. PITT 79-213

Citation No. 229362
February 22, 1979

Docket No. PITT 79-214

Citation No. 229363
February 22, 1979

Sunbeam Mine

DECISIONS

Appearances: Bruno A. Muscatello, Esquire, Butler, Pennsylvania, for the contestant;
Eddie Jenkins, Esquire, Arlington, Virginia, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern notices of contests filed by the contestant (Sunbeam) on March 21, 1979, pursuant to section 105 of the Federal Mine

Safety and Health Act of 1977, seeking review of the captioned abated citations issued pursuant to section 104(a) of the Act, on the ground that the unilateral "Significant and Substantial" findings made by the inspector on the face of the citations was unreasonable, unjustified, and unwarranted. Respondent filed its answers on April 6, 1979, asserting that the citations were properly issued, that the violations existed as stated in the citations, and that the time fixed for abatement of the citations was reasonable and proper. At the same time, respondent filed motions to dismiss the contests on the ground that the conditions cited were fully abated and the citations terminated. In support of the motions, respondent cited a prior Interior Board of Mine Operations Appeals' decision under the 1969 Act, Reliable Coal Corporation, 1 IBMA 50, 59 (1971), and several judges' decisions pursuant to the 1977 Act, Helvetia Coal Company, PITT 78-322, August 23, 1978; Monterey Coal Company, VINC 78-372, June 19, 1978; Peter White Coal Mining Corporation, HOPE 78-371, June 16, 1978; and Itmann Coal Company, HOPE 78-356, May 26, 1978. By order issued on May 9, 1979, I denied respondent's motions to dismiss, and I did so on the basis of the Commission's decision of May 1, 1979, in Energy Fuels Corporation v. MSHA, DENV 78-410. Hearings were subsequently conducted in Pittsburgh, Pennsylvania, on October 10, 1979, and the parties appeared and participated therein. Posthearing proposed findings, conclusions, and supporting briefs were filed by the parties and the arguments presented therein have been fully considered by me in the course of these decisions.

Issues Presented

1. Whether the contestant is entitled to immediate review of section 104(a) citations which have been abated and terminated.

2. Whether the citations which were issued in these proceedings constituted violations of the cited safety standards and whether they were "significant and substantial" violations as found by the inspector.

Applicable Statutory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, effective March 9, 1978, 30 U.S.C. § 801 et seq.

2. Section 104(a) of the Act provides as follows:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the

citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a violation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

3. Section 104(d) provides in pertinent part as follows:

> *If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that*, while the conditions created by such violation do not cause imminent danger, *such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard*, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, *he shall include such finding in any citation given to the operator under this Act*. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated. [Emphasis added.]

4. Section 105(a) provides that:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of miners in such mine. If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment

of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency. Refusal by the operator or his agent to accept certified mail containing a citation and proposed assessment of penalty under this subsection shall constitute receipt thereof within the meaning of this subsection.

5. Section 105(d) provides that:

> If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement of a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104.

Discussion

Docket No. PITT 79-210

Citation No. 229432, issued on February 22, 1979, citing a violation of 30 CFR 77.1607(cc) reads as follows: "The unguarded No. 1 Wash Belt at Sunbeam Preparation Plant was not provided with emergency stop devices or cords along the walkway. The belt was energized and operating."

MSHA's Testimony and Evidence

MSHA inspector John E. Felichko testified that he has been a coal mine inspector since 1977, but has 9 years of mining experience. His primary duties entail the inspection of electrical circuits, and he attended a 13-week MSHA coal mine inspector's training course at Beckley, West Virginia, and he has also had 4 weeks additional electrical training during the past two summers. He confirmed that he issued the citation in question and stated that he did so on the ground that the conveyor belt cited failed to have the required emergency stop pull cord or similar device along the full length of the belt walkway where employees are exposed to moving belt rollers and the belt. The conveyor belt in question is an inclined belt which originates inside the coal preparation plant and extends outside where it carries washed coal to be loaded on railroad cars for shipment, and it was energized and operating when he observed the violation.

The inspector indicated that there is no type of emergency stop device located anywhere along the conveyor belt except inside the coal preparation plant where the control is located, and the belt posed a hazard to employees because there is no means of stopping the belt in the event a person should become entrapped either in the roller or belt. Employees, especially repairmen, clean, lubricate and repair the conveyor belt periodically. In the event of an accident, the operators in the control room may be able to see an employee on the conveyor belt, but this would depend on where the person is located along the conveyor belt. Since there is a window in the control room, if one were to look out, he may be able to determine whether an employee is along the conveyor belt before he starts it (Tr. 10-19).

Inspector Felichko testified that the citation was abated in good faith and he believed the condition cited was serious because there was no means to control the belt along the walkway. He identified a copy of a "gravity sheet" (Exh. M-3) which he filled out at the time the citation issued, and he stated that the person likely to be injured, as shown on that sheet, was one man who he assumed would be along the belt performing his duties, but he actually observed no one there at the time of the citation. Regarding the "S & S" or "Significant and Substantial" finding which he marked on the citation, he answered as follows when asked why he checked that box on the citation form (Tr. 21):

> Q. Thank you. When you checked significant and substantial what was going through your mind?
>
> A. The conditions surrounding the citation.
>
> Q. And?
>
> A. And also that it is MSHA's method of recordkeeping to determine whether hazard [*sic*] violations exist or not.

On cross-examination, Inspector Felichko testified that the inclined conveyor belt is approximately 125 to 150 feet long, and the head roller was about 25 feet above ground level. The walkway was composed of expanded metal which has a guard on the outside edge facing the ground, and both the belt and rollers were exposed. Although he looked out of the control room window, he could not recall whether he could see the entire length of the belt and did not take this fact into consideration when he cited the violation. He made no inquiries as to whether anyone is required to be in the area while the belt was running, and he observed no maintenance or lubrication going on while the belt was running. In his experience, such work is definitely not done while a belt is running. The only time someone would come in contact with the belt would be if they were walking along one side, or if the belt were shut from inside while someone was performing maintenance and someone inadvertently started it up with no means to shut it off. Although there is an alarm that is energized by hand before the belt starts up, the belts do not run in sequence and can be started independently, and with the noise level of other running belts, it is possible that one would not hear the alarm (Tr. 23-26).

Mr. Felichko stated that there is guarding along the right side of the belt to prevent one from falling off the walkway to the ground below. He stated that the violation was serious and that is why he marked the "S & S" box on the citation form. He believes that all violations are serious, but the question of whether all violations are "significant and substantial" would depend on the circumstances involved. He confirmed that MSHA utilizes the "S & S" findings to determine whether a pattern of violations exists. When asked to explain his understanding of the term "significant and substantial," he answered as follows (Tr. 28): "To me significant and substantial means that the violation could be more hazardous. Whenever you check that box, it is a more hazardous condition. It is hard to answer exactly what it means."

Mr. Felichko stated that he was concerned about all of the moving parts on the belt, i.e., rollers, belt, and belting, where a person could become trapped, caught, or pulled in. The belting was exposed, the plant operates year round, and one could slip or fall on the walkway, and while there is spillage at times, he observed none on the belt or walkway in question (Tr. 30). The required emergency stop device is not to prevent one from being entangled in the belt, but only to stop the belt. He confirmed that he issued two other citations the same day and he deemed those to be significant and substantial because they were of a serious nature (Tr. 31). During the first inspection quarter of 1979, he issued approximately 35 citations, and only one of those was not a significant and substantial violation because it dealt with recordkeeping. He is not aware of any July 5, 1979, MSHA interpretative memorandum dealing with significant and substantial violations (Tr. 34-36).

Mr. Felichko testified that while he was aware of injuries caused by moving conveyor belts and rollers, he was not aware of any injuries resulting from a failure to provide an emergency belt shut-off device, and the purpose of such a device is to deenergize the belt in the event someone wants to shut it down or someone becomes entrapped (Tr. 36-37).

On redirect examination, Mr. Felichko identified a blank MSHA citation form, and reading from the reverse side concerning the issuance of a significant and substantial citation, he read the following into the record

(Tr. 38): "By checking the significant and substantial box the inspector has indicated that this violation could significantly and substantially contribute to a health or safety hazard, and that this violation will be considered in determining whether a pattern exists."

In response to bench questions, Mr. Felichko testified that the belt in question moves "fairly fast," and he described its operation. The walkway was of a non-slip surface, and the handrailing on the right side was there for someone to hold onto while walking up the incline. The tail roller was guarded, the head belt roller was guarded by location, and the entire open-type belt was required to be guarded by either stop cords or guards. A stop cord is a substitute for a guard, and while a guard would physically prevent one from falling into the belt, a stop cord would give him access to shut the belt off as he was falling in. Had a stop cord been installed along the entire length of the belt, he would not have issued a citation, and he considered the citation significant and substantial because of the lack of such a cord. The walkway was in fairly good condition, and general periodic maintenance has to be performed on the belt and the roller bearings should be greased once a day, but he does not know the company's maintenance schedule. Even if he did, he would still have made a finding that the violation was significant and substantial because of the injury which would result from one getting caught in a belt (Tr. 40-49).

Contestant's Testimony and Evidence

Nicholas DiBiase, general manager, Sunbeam Coal Corporation, described the belt conveyor in question as being on a 15-degree incline, and the belt area which concerned the inspector was the last 30 feet of the conveyor. The walkway in question was parallel to the ground and was not on the same incline as the belt, and in fact, he described it as a standing work area completely visible from the plant operator's station. He characterized the belt as a slow 30-inch belt carrying 100 tons of coal a minute. Mr. DiBiase indicated that he helps establish company policy regarding maintenance and lubrication, and stated that this work is done at the beginning of the shift before the plant is started or at the end or evening shift when the plant is down. Maintenance and lubrication never takes place while the belt is running, and no one is allowed near the walkway while the belt is running. No one has any need to be at the belt and the two operators on duty are at their stations (Tr. 51-56). If the operator observes someone on the walkway, he is instructed to shut down, but he should be able to observe anyone approaching the belt before he gets near it because there are 25 or 50 steps to climb to reach the belt area (Tr. 56). The shut-off device was installed soon after the inspection and as soon as he could get an electrician, and it was installed in a day and a half. The installation of the device would still not prevent an accident (Tr. 57).

On cross-examination, Mr. DiBiase testified that 30 percent of the belt is visible from the control room, and the catwalk area, which is the only area where anyone could get near the belt, is visible and the belt is 12 feet off the ground in some places, and one would need to use a ladder and intentionally climb to reach the belt in those areas. If someone were in the other 70-percent area of the belt, he could not be seen if he were caught in it. There are only two men in the plant and they both have speakers for communication. The main switches are locked out at noon and at the end of the shift (Tr. 59). He was aware of the fact that emergency stop devices are required, but only where there are workers in the area, and that is the way he interpreted the standard. In his view, the belt in question does not require such a device (Tr. 61). However, he did as the inspector requested and installed a stop cord. No one would walk up the incline parallel to the belt since he would have no need to (Tr. 62). He agreed that a stop cord along the belt would help prevent a further accident if the person caught in the belt was conscious enough to grab it (Tr. 64).

Mr. DiBiase drew a diagram of the belt area on a blackboard provided in the courtroom and he stated that the walkway described by the inspector did not run parallel to the belt, but rather, the area described as a "walkway" was in fact a platform that intersected the belt (Tr. 65; Exh. ALJ-1). There is no walkway running adjacent to the full length of the belt, and the walkway is parallel to the ground (Tr. 66). The two people on duty are the only two assigned to the belt system. One main operator stands at the top of the wash plant and controls all the conveyor belts and the feeder area, and the second operator is inside the plant and he controls the dryer and drag tank area. If one were to climb the ladder off the platform, he would be exposed to some portion of the belt which was an exposed unguarded portion where the platform intersects the belts (Tr. 68). Greasing is performed by walking up the ladder, and the grease lines come down from the head pulley so that the greaser can reach them with a grease gun, but this is done when the belt is down (Tr. 69). Access to the head pulley is by a ladder (Tr. 70). One can touch the conveyor from the platform, and he could reach about 15 or 20 feet of the belt (Tr. 72). The platform structure has been in place for some 20 years (Tr. 74).

Inspector Felichko was called in rebuttal and testified as to a diagram which he believe depicts the location of the so-called walkway (Exh. M-3-a). He described the area and indicated where the belt came from the plant, and he agreed with Mr. DiBiase's description of the location of the platform (Tr. 76-81). Mr. Felichko stated he remembered the unguarded portion of the belt where the walkway was located did not have an emergency stop device (Tr. 86).

Docket No. PITT 79-211

Citation No. 229433, issued on February 22, 1979, citing a violation of 30 CFR 77.701, states as follows: "The 110 V light fused disconnect box located in the shop of Sunbeam Preparation Plant was not frame grounded. The light circuit was energized."

MSHA's Testimony and Evidence

Inspector Felichko confirmed that he issued the citation in question after observing that a disconnect box which controlled the lights in the shop area of the preparation plant was not frame grounded in that there was no safety ground to the frame of the box. The box was located on the inside of an outside wall of the shop, and it was energized because the lights were on and the entrance of the preparation plant was wet and muddy. There was no insulated mat where the switchbox was located, and the purpose of the frame ground is to protect a person from electric shock. He described a frame ground as a safety wire that carries shock currents through the ground wire to the earth to protect against a shock hazard. Although he did not measure the amperage to find out how much current was involved, the circuit was energized because the fluorscent lights were on. Based on the fact that the box frame was not properly grounded and the outer insulation on the cables which entered the box was frayed, he believed this to be a significant and substantial violation. In order for a person to be shocked, the box must become energized under fault conditions which entail several things such as dampness, a loose fuse, or physical damage. The citation was abated by contestant installing a grounding conductor to the box frame (Tr. 88-91).

The inspector believed the violation was serious because it presented a potential shock hazard under fault conditions. He believed it was significant and substantial because the fuse disconnect box was mounted on a wooden board, the floor was wet and muddy, and the box was not frame grounded. In the event someone touched the box while it was energized, a potential shock hazard would exist. Although he knows of no incidents where such an ungrounded box resulted in an injury, he is aware of two fatalities in 1978 involving low-voltage circuits, and in one case a person holding a hand-held paint sprayer that faulted out and did not have a frame ground or double insulation was electrocuted. The other case involved a welder who was electrocuted by a light bulb filament which burst when he contacted it (Tr. 92-93).

On cross-examination, Inspector Felichko testified that the outer insulation on the cable was frayed but the insulation on the inner conductors was in good shape. The box could possibly become energized if the fuse loosened under the load. Although contestant was cited for improper grounding, he did not issue a citation for substandard cable conduction. With the floor being wet, and the absence of an insulation mat, an electrocution was likely to occur, especially in light of improperly-grounded electrical equipment, and a person can easily get electrocuted with 110 volts (Tr. 93-98).

In response to bench questions, the inspector conceded that he did not test the amperage with a meter and his reason for not doing so was that from his past experience there is more than ample amperage to cause a fatality under fault conditions (Tr. 101).

Docket No. PITT 79-212

Citation No. 229434, issued on February 22, 1979, citing a violation of 30 CFR 77.513, states as follows: "The 110 V light fused disconnect box located in the shop of Sunbeam Preparation Plant did not have an insulated mat or a grounded metal plate at the same potential as the grounded metal, non current carrying parts of the power switch box. The switch box was energized."

MSHA's Testimony and Evidence

Inspector Felichko confirmed that he issued the citation in question and he stated that section 77.513 required an insulated mat or a grounded metal plate at the same potential as a noncurrent-carrying part of the electrical installation at each disconnect switchbox where there is a shock hazard potential. The disconnect box in question was the same one cited in the previous docket. The lack of an insulated mat, coupled with the lack of a frame ground, makes this violation more serious. The circuit was energized and the floor was wet and muddy. The outer cable insulation was frayed at the point where it enters the cable clamp. The violation was abated by installing a piece of belting on a wooden pallet which created a difference of potential between the earth and the box frame (Tr. 106-109).

Mr. Felichko confirmed that he indicated on his inspector's gravity statement that "the occurrence of the event against which this cited standard is directed was probable," and he stated it was probable because the frayed insulation on the outer cable jacket would possibly cause the box to become energized. He marked the "S & S" box on the citation form because he believed the violation was serious and thought it could contribute significantly and substantially to a health or safety hazard (Tr. 110-111).

Contestant's Testimony and Evidence

Mr. DiBiase testified as to both Citation Nos. 229433 and 229434, and stated that the failure to frame ground the switchbox in question would contribute to a possible accident, but that it was not imminent. However, the failure to install an insulated mat would not substantially contribute to the cause and effect of a potential accident. He considers electrocution to be serious, and he indicated that he has operated power tools in the past after removing the required ground, and knew that by doing this he was placing his life and health in jeopardy. He agreed "pretty much" with the inspector's testimony and did not dispute the fact that the box was not frame grounded and that there was no insulated mat provided (Tr. 116-119).

Docket No. PITT 79-213

Citation No. 229362, issued on February 22, 1979, citing a violation of 30 CFR 77.205, states as follows: "A safe means of access was not provided and maintained to the working place in that the end of the walkway on the third level of the Sunbeam Preparation Plant was not protected by a railing, barrier, or other protective device."

MSHA's Testimony and Evidence

MSHA inspector James A. Magness confirmed that he issued the citation in question citing a violation of section 77.205 on the ground that a safe means of access was not provided and maintained to the working place in that the end of the walkway on the third level of the preparation plant was not protected by a railing, barrier, or other protective devices. The walkway was approximately 40 inches wide, and while the lighting was not inadequate, it was poor, but he could not be more specific since he did not use a light meter. The east wall of the preparation plant was on one side of the walkway, and plant machinery on the other. He considered the violation to be serious, and reading from the citation form, he defined a "significant and substantial" violation as "[a] violation could significantly and substantially contribute to the health and safety hazard and that the violation will be considered in determining whether a pattern exists." He believed that an employee walking in the area could possibly fall off a 7-foot drop at the end of the walkway to the next level. The walkway was level, and there are access stairs or ladders from level to level. He observed no one in the area during his inspection but indicated that it is possible that a repairman would be in the area. The violation was abated by installing a gate-type guard structure to prevent employees from falling off the end. There was a beam some 5 feet above the walkway running parallel to the end of the walkway, but he observed nothing that one could grab onto to prevent him from falling to the lower level. There were no warning devices of any kind advising persons that the walkway would end by a drop to the next level below, and he considers the violation serious and that it is significant and substantial because it contributes to a safety and health hazard (Tr. 120-129).

Mr. Magness confirmed that he marked "improbable" on the gravity portion of his inspector's statement, and he stated that the reason he did so was the fact that while he observed no one in the area at the time of his inspection, it was still significant and substantial because "it could happen to anybody at any time." If one were to fall over the end of the unguarded walkway, serious injuries could result (Tr. 130).

On cross-examination, Mr. Magness testified that the only written directive he has received on the meaning of the term "significant and substantial" is the instruction printed on the back of the citation form. He denied that he made the "S & S" finding with the intent or the possibility of establishing a pattern of violations (Tr. 130-131). He candidly admitted that he has received oral instructions to treat all violations as significant and substantial (Tr. 130-135). Regarding the overhead beam at the end of the walkway, Mr. Magness stated that it would not keep anyone from walking off the end of the walkway. He did not discuss with anyone the purpose for and the use made of the walkway in question, and he observed no safety belts or lines in the area (Tr. 137).

In response to bench questions, Mr. Magness testified that he considered the location cited a working place because the walkways are used to support the machinery in the plant. He was concerned with subsection (e) of section 77.205, and he would accept any type of a barrier as compliance as long as it prevented one from going off the end of the drop-off. The walkway was not a "communication travelway" frequently used by men to get around the plant, but someone could possibly be there for maintenance purposes. Even if one were to go there only once a year, the fact that he might fall off the end that one time makes it a significant and substantial violation. He believes that any violation which is going to create a hazard to an employee is significant and substantial (Tr. 139-141).

Contestant's Testimony and Evidence

Mr. DiBiase described the overhead beam in question and stated that it was part of the superstructure of the building and some 4-1/2 feet from the walkway, shoulder height, and some 18 inches or 2 feet from the end of the platform. One would have to dip or stoop under the beam to get to the end of the platform. The platform is used to raise equipment up from the lower levels for maintenance, and it is normally used when there is a major breakdown or repairs once a month, but in the last year it has not been used at all. Safety belts are required to be worn at anytime persons are working on an unguarded platform. He believed the lighting was sufficient because it was not an area where an employee normally stands to work, and if he is in the area working he will use a trouble light. When the plant is operating there is no reason for anyone to be working at the end of the platform. However, when maintenance is being performed or materials are being hoisted, it sometimes is necessary to get near the end (Tr. 143-148).

On cross-examination, Mr. DiBiase testified that safety belts are provided anywhere work is performed in heights, and that he was aware of the fact that there was no handrail at the end of the walkway. The reason for not having one at that location is that equipment is moved on and off the end of the walkway and such a rail would not provide enough clearance. The walkway is used only for maintenance, and in the past this has been approximately once a month (Tr. 148-149).

Inspector Magness was recalled and testified that his interpretation of the term "safe means of access" is that one can travel in a working area in safety without falling off the end. Had there been a handrail, chain, barricade, partition, etc., installed there, he would not have cited a violation. He indicated that he went to the edge of the walkway but he did not hit anything overhead and he is 5 feet 11 inches tall. Abatement was achieved by the installation of a guard railing (Tr. 151-156).

Docket No. PITT 79-214

Citation No. 229363, issued on February 22, 1979, citing a violation of 30 CFR 77.400, states as follows: "A guard was not provided on the conveyor drive head of the clean coal (stoke) belt at the Sunbeam Preparation Plant."

MSHA's Testimony and Evidence

Inspector Magness confirmed that he issued the citation in question and stated that the purpose of the conveyor belt guard is to protect an employee from becoming entangled between the belt and metal roller which is powered by an electric motor. There is little or no space between the belt and roller, and at the entry of the belt over the drive head roller there is a pinch point, but he could not state whether any employees would be at that location. Although the belt was not in operation when he cited the violation, it was not disconnected. He considered the violation to be serious and significant and substantial because people have been caught in similar belts. To abate the citation, a metal and wire guard was installed around the belt to substantially protect a man from being caught in it (Tr. 157-160). Mr. Magness stated that he marked his gravity statement "improbable" because the belt was not running and the mine foreman advised him that the belt was seldom used since it was a special one used only for stoker coal. Although there is always a chance of someone being caught in a belt, in this case there was less chance of this event happening (Tr. 160).

On cross-examination, Mr. Magness stated that while he made no measurement, the end of the conveyor was within his extended reach of some 5 feet 11 inches off the ground and he could reach the drum and belt pinch point by standing. One could not inadvertently be caught in the pinch point unless they fell or were working on the parts, and he could recall no extended grease fittings. If one were working on the equipment, it is possible that the guards would be removed, and if he is working on a belt roller the power will be disconnected completely. He observed no one working in the area on the day he issued the citation and he did not know how frequently the belt was used (Tr. 162-167).

In response to bench questions, Mr. Magness stated that there was no guard of any kind at the cited belt location, and if the motor had been disconnected altogether there would be no violation because there would not have been a functioning piece of equipment that could do damage to anyone. However, if it were merely deenergized he would still cite a violation. He considered the violation to be significant and substantial because the belt was functional and probably operated on previous occasions without a guard and someone could inadvertently catch their hand in the pinch point (Tr. 167-170).

Contestant's Testimony and Evidence

Mr. DiBiase testified that he did not believe one could inadvertently become entangled in the conveyor belt in question, and in order for this to happen, a person would have to make an effort to reach in or someone flipped the switch on. However, the disconnect switch is pulled and locked out whenever someone is working on the belt. The belt in question is used infrequently or 5 to 10 percent of the time. He did not believe the violation was significant and substantial because it is not an obvious violation which presented an obvious risk of injury to a worker and the plant had been inspected for years and no one ever pointed the violation out to him in the past (Tr. 174-177).

On cross-examination, Mr. DiBiase stated that due to the fact that the head pulley was located shoulder-high, he did not believe someone could inadvertently fall into it even though he agreed with the inspector that someone could trip on the adjacent walkway. The belt had guards installed where he believed they were needed, and chain guards were installed in the gear box to the drive motor on the head pulley. There was a physical metal can-type guard covering the gear sprocket drive, but the conveyor belt was not guarded (Tr. 177-181).

Respondent's Arguments

In its posthearing brief, MSHA argues that the term "significant and substantial" is found in substantially identical form in two sections of the 1977 Act, namely, sections 104(d)(1) and 104(e)(1). Section 104(d)(1) deals with citations and orders for violations of the Act, and in that context "significant and substantial" refers to one element which must be present for the proper issuance of a 104(d)(1) citation. Section 104(e)(1) also deals with violations of mandatory health and safety standards, but in particular with instances where a pattern of violations exists.

In analyzing the meaning of the term in either section, MSHA asserts that it must be remembered that "significant and substantial" is really a shorthand expression, and for that reason it must not be divorced from the language which surrounds it. The term can only be effectively understood by viewing it in the context in which it appears. In either section it refers to a violation which is of "such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards * * *." (Emphasis in original.) Once it is appreciated that the term "significant and substantial" cannot be treated in isolation, the importance of the surrounding language becomes clear.

In support of its arguments, MSHA points out that the first observation one makes in a contextual analysis is that the nature of the violation need only be such as "could have" significantly and substantially contributed to the cause and effect of a mine health or safety hazard. The term "could have" suggests far less certainty than other language such as "would have" infers. In this context, "could have" means "possibly, but not necessarily have" significantly and substantially contributed to the cause and effect of a mine health or safety hazard. Citing the case of Alabama By-Products Corporation, 7 IBMA 85, November 23, 1976, MSHA states that the term "could have" means less than probable, and that the violation need only significantly and substantially contribute to the cause and effect of a mine safety or health hazard. That is, the cited violation need only contribute to the hazard in terms of playing a role in its cause and effect and need not cause the hazard. However, the nature of such contribution must be significant and substantial.

With respect to the meaning of the term "significant and substantial," MSHA maintains that as defined in Alabama By-Products, the phrase refers to all violations except those which are purely technical or those where any injury could result but there is only a remote or speculative chance of that injury coming to fruition. Citing the legislative history of the 1977 Act, MSHA quotes the following statement which it believes supports its interpretation that the construction of the term "significant and substantial" applies to all violations except those that are purely technical: "The Committee notes with approval that the Board of Mine Operations Appeals has reinterpreted the 'significant and substantial' language in Alabama By-Products Corp., 7 IBMA 85, and ruled that only notices for purely technical violations could not be issued under Sec. 104(c)(1)." S. Rep. No. 181, 95th Cong., 1st Sess., 31 (1977 Senate Report).

In summary, MSHA argues that applying the rationale of Alabama By-Products, the significant and substantial contribution to the cause and effect of a mine health or safety hazard means that the cited violation could play a role in the creation or existence of a hazard, and that the role it could play would be neither technical, remote nor speculative. On that basis, two questions should be asked in making this determination:

1. Could the cited violation contribute to the cause and effect of a mine health or safety hazard?

2. If the answer is yes, is the nature of the contribution such that its role as contributor would be neither technical, remote, nor speculative?

An affirmative answer to both questions should mandate a finding that the cited violation is "significant and substantial."

Contestant's Arguments

In its posthearing brief, contestant takes the position that the "significant and substantial" block used by MSHA on the citation form should only be used when a condition exists that increases the likelihood of an accident occurring. Since all standards are promulgated with the hope that a potential accident could be avoided, and since citations are issued for failure to comply with the requirements of a standard, contestant asserts that the additional finding by an inspector that the mere violation of a standard would significantly and substantially contribute to a health or safety hazard is not justified in every case. Further, contestant argues that the significant and substantial criteria should only be used when the likelihood of a mining accident is greatly increased by the failure of the operator to comply with the standard, and that the use of the criteria in a section 104(a) citation is not justified since neither the Act nor MSHA's regulations issued thereunder permit an inspector to unilaterally determine that an alleged violation could significantly and substantially contribute to the cause and effect of a mine safety hazard.

With respect to each of the citations issued in these proceedings, contestant argues that the only reasonable interpretation of the criteria of "significant and substantial" is one of cause and effect, and that a simple "but for" test should be applied to the question. That is, "but for" the absence of the protective device required by the cited safety standard, would an accident have happened. Contestant maintains that the seriousness of the injuries that might result from the failure to comply with the criteria is not relevant to the question of whether a condition could cause an accident. Since the inspector who issued the citations testified that he had received instructions to mark all violations "significant and substantial," contestant concludes that an inspector is given no discretion to determine this criteria on a case-by-case basis. Additional arguments presented by the contestant with regard to each citation are discussed in my following findings and conclusions.

Findings and Conclusions

Reviewability of the Citations

Although MSHA's posthearing brief does not address the question of the reviewability of an abated section 104(a) citation, during the course of the hearing MSHA's position was stated to be as follows (Tr. 7, 8):

> MR. JENKINS: It is the Secretary's position that the 105 review which is permitted in the Federal Mine Safety and Health Act of 1977 does not establish the right by the Applicant to contest the box marked S and S of a 104(a) citation.
>
> The 105 review is for citations of proposed assessments. The Secretary believes that the Applicant has contested neither, but contested MSHA's recordkeeping box designated S and S.
>
> We feel that 105(a) does not require a finding of significant and substantial. Any challenge to the significant and substantial box on the citation is irrelevant and immaterial to the review of a 104(a) citation.
>
> S and S is part of MSHA's recordkeeping system. An inspector may find in the cases before court today, will testify that these violations are serious, but the S and S is part of the recordkeeping process to the finding of a 104(e) pattern.
>
> Since there has been no finding of a 104(e) pattern, the violation is a challenge to S and S and is premature and not ripe for this proceeding. Similar to a probable cause by a police officer, the S and S is MSHA's recordkeeping process, and is not reviewable until the adversary proceeding of a 104(e) is at issue.

In this particular case there has been no charge, formal charge of a 104(e). Therefore, this type of action within a 105 proceeding is inapplicable.

Energy Fuels Corporation v. MSHA, DENV 78-410, decided by the Commission on May 1, 1979, concerned a section 104(a) citation which contained section 104(d)(1) findings of a "significant and substantial" and "unwarrantable failure" violation. The question presented in that case was whether an operator served with a citation for a violation that has been abated may immediately contest the allegation of violation in that citation. The Commission answered the question in the affirmative. After a somewhat exhaustive discussion of the legislative history, during which it noted that reliance on the uncertainties in the legislative history makes reliance on it an uncertain matter, the Commission concluded that the safety and health of the miners would not be adversely affected by immediate review of an abated citation, and that any adverse impact on the interests of the Secretary by immediate contestability were not entirely clear. In discussing the potential adverse impact on an operator which would result if he were not afforded an opportunity for immediate review, the Commission at several points in its discussion (pages 9 and 10) alluded to the fact that the citation which was issued contained special findings under section 104(d), and it seems clear that this fact influenced the Commission in concluding that review of the citation was in order.

Helvetia Coal Company v. MSHA and Rochester & Pittsburgh Coal Company v. MSHA, Docket Nos. PITT 78-322 and PITT 78-323, decided by the Commission on May 1, 1979, both involved review petitions seeking review of section 104(a) citations issued pursuant to the 1977 Act, and the conditions were abated and the citations terminated at the time the review petitions were filed. In addition, contrary to the instant proceedings in Sunbeam, neither citation contained any special findings under sections 104(d) or (e) of the Act. Judge Merlin dismissed the applications for review of the citations on the ground that the citations were not reviewable until after the Secretary proposed civil penalties. On October 11, 1978, the Commission granted discretionary review, and on May 1, 1979, reversed and remanded the cases to Judge Merlin and in so doing followed its decision of that same date in Energy Fuels Corporation v. MSHA, Docket No. DENV 78-410.

In Helvetia and Rochester & Pittsburgh, the Commission took note of the fact that in Energy Fuels, the 104(a) citation contained special findings under section 104(d) and thus exposed the operator to a possible withdrawal order before a penalty could be proposed. Although the citations in Helvetia and Rochester & Pittsburgh had no special findings, the Commission nevertheless held that permitting the immediate contests of the citations would not "unduly burden others." Further, while commenting that it was arguably unlikely that Helvetia and Rochester & Pittsburgh will need a hearing before a penalty is proposed, and while taking particular note of the fact that the citations in question were abated and contained no special findings, the Commission nevertheless noted that it would be desirable for a hearing to be quickly scheduled if the conditions cited often recur, if abatement efforts are expensive, or if another case is being heard on the same issue and early consolidation would be beneficial.

In view of the foregoing, I believe it is clear that the Commission recognized that under certain circumstances and conditions, immediate review of abated citations is in order. In Energy Fuels, the special findings made under section 104(d) exposed the operator to a possible withdrawal order before a penalty could be proposed. In Helvetia and Rochester & Pittsburgh, while no special findings were made in connection with the section 104(a) citation, the Commission was obviously concerned with circumstances such as recurring violations, expensive abatement efforts, and consolidation of similar issues.

In the instant cases, all of the citations were issued pursuant to section 104(a) of the Act. In addition to the narrative description of the condition on the face of the citation, which prompted the inspector to cite the specific mandatory safety standard allegedly violated, the inspector checked the "significant and substantial" box on the face of the citation form and thus made the special findings in this regard referred to in section 104(d) as an additional finding in support of the section 104(a) citation.

Inspector Felichko indicated that the term "significant and substantial" means a "serious violation," that when he checks the "S & S" box on the citation form he considers the "conditions surrounding the citation," and that the "S & S" finding "is MSHA's method of recordkeeping to determine whether a violation was significant and substantial" (Tr. 21). He also believes that all violations are serious but that the circumstances presented in each case would determine whether a violation was significant and substantial (Tr. 27). He defined the term as follows (Tr. 28): "To me significant and substantial means that the violation could be more hazardous. Whenever you check that box, it is a more hazardous condition. It is hard to answer exactly what it means."

Inspector Magness testified that the only directive available to him as to the meaning of "significant and substantial" is the statement imprinted on the back of the citation form and that his intent was not to attempt to establish a pattern of violations. He indicated that he issued the citations on the basis of "what I thought could possibly create a hazard" and that his primary consideration when issuing citations is to prevent health and safety hazards (Tr. 130-132). He candidly admitted that he has received oral instructions that all health and safety violations are significant and substantial (Tr. 135-136).

It seems to me that Congress must have had something in mind when it enacted the 1969 Act, and the 1977 Amendments thereto, and provided a varied enforcement scheme which encompasses the issuance of citations and withdrawal orders for violations of mandatory standards (104(a)); withdrawal orders for failure to timely abate a violation (104(b)); unwarrantable failure citations and withdrawal orders (104(d)(1) and (2)); imminent danger orders pursuant to section 107(a); and "almost" imminent danger citations and orders pursuant to sections 107(b)(1) and (2). Unfortunately, the legislative history of both the 1969 and 1977 Acts has little substance insofar as the construction of the term "significant and substantial" is concerned. The Board in the Alabama By-Products case simply read into the D.C. Circuit's opinion in UMWA v. Kleppe a theory of construction on which the court had nothing to say, and the Senate Committee simply gave it its blessing by noting with approval the Board's conclusion that "significant and substantial" does not include purely "technical" violations. From that point on, it is obvious to me that MSHA has instructed its inspector force to mark all citations "S & S" without any real considerations being given to the facts and circumstances which prompted the inspector to cite a violation in the first place. In short, MSHA has lifted from section 104(d) a construction of the term "significant and substantial" so as to apply it automatically to virtually all citations, transposed it to section 104(a), and once a citation is issued, will use that section 104(a) citation as the basis for again citing a mine operator with a pattern violation notice which, in turn, will leave him vulnerable to a summary closure order if another 104(a) citation is issued within 90 days of the pattern notice.

The "pattern of violation" provision of the 1977 Act is an additional and exceptional enforcement tool available to MSHA. Section 104(e) requires that an operator be given a notice that a "pattern of violations" exists in his mine if the violations could "significantly and substantially" contribute to the cause and effect of a health and safety hazard. The issuance of a notice that a pattern of violations exists at the mine not only alerts the mine operator of serious health and safety problems in his mine, but also triggers a series of subsequent MSHA enforcement actions which could result in the issuance of withdrawal orders and the closing down of the mine. The chain of "pattern" citations and withdrawal orders can only be broken if, pursuant to section 104(e)(3), an inspection of the entire mine discloses no "significant and substantial" violations. However, if any such citations are issued, the operator is deemed to have reestablished a "pattern" and the mine reverts to the "chain" provisions of sections 104(e)(1) and (2).

It should be noted that while an unwarrantable failure citation issued pursuant to section 104(d) must be of a "significant and substantial" nature and must be the result of an operator's "unwarrantable failure" to comply, a "pattern" citation issued pursuant to section 104(e), need only be based on a "significant and substantial" finding, and there is no requirement that the violations establishing the pattern be the result of the operator's "unwarrantable failure" to comply. Leg. Hist., S. Rep. No. 95-181, 95th Cong., 1st Sess., 33 (1977). Further, while section 104(a) contains no specific provision for a finding of "significant and substantial" in conjunction with the issuance of a citation under that section, section 104(d) authorizes an inspector to make such a finding in any citation given to the operator under this Act. Thus, while it may be argued that the lack of any specific mention of the term "significant and substantial" in section 104(a) is a clear indication that Congress did not intend to authorize such a finding in connection with a citation issued under that section, but only intended such a finding to be made in connection with unwarrantable failure citations under subsection (d), the statutory language "in any citation given to the operator under this Act," coupled with the legislative history and judicial decisions dealing with the construction of "significant and substantial," indicates Congressional approval of the practice of making such findings in a section 104(a) citation. It also seems clear that citations issued pursuant to section 104(a) which contain "significant and substantial" findings by an inspector will serve as the basis for the issuance of subsequent "pattern" citations pursuant to section 104(e), and the reverse side of the MSHA citation form confirms this. The pertinent portion of the form reads as follows: "NOTE: By checking the significant and substantial box, the Inspector has indicated that this violation could significantly and substantially contribute to a health or safety hazard and that this violation will be considered in determining whether a pattern exists."

Section 104(e)(4) of the Act mandates that the Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations exists. As reported in a recent October 14, 1979, issue of the Mine Safety and Health Reporter, published by the Bureau of National Affairs, at page 233, MSHA's Director for Civil Penalty Assessments indicated that MSHA is in the process of preparing guidelines for determining when a pattern exists. In light of MSHA's assertions in these proceedings that the marking of the "S & S" box on the citation form is merely a "recordkeeping" function, and in view of the inspector's testimony that his instructions are to check the "S & S" box on every citation which he issues, the promulgation of such guidelines should be of top priority in order to assure even-handed enforcement by communicating the ground rules to those mine operators being regulated under the Act. To do otherwise would subject an operator to serious sanctions and penalties based on arbitrary and unreasonable actions by an inspector who automatically, and without any considered judgment, makes "findings" that a violation is significant and subtantial by merely checking a box on a citation form. This becomes particularly critical, from a due process point of view, when the groundwork for the issuance of pattern citations and withdrawal orders is begun by an inspector who mechanically checks the "S & S" box for every section 104(a) citation which he issues without any serious consideration being given to all of the prevailing facts and circumstances which prompted him to make that judgment in the first instance.

Following Energy Fuels and the foregoing discussion, I conclude that since an operator is vulnerable to serious consequences resulting from an "S & S" finding, the contestant is entitled to a review of both the fact of violation and the inspector's additional finding of "significant and substantial," notwithstanding the fact that the citations were abated. I further conclude that the burden of proof is on the Secretary to establish the existence or occurrence of the violation as well as the burden of producing facts to support the conclusion that the citations were significant and substantial.

Significant and Substantial

The "significant and substantial" provision found in section 104(d) of the 1977 Act is identical to that found in section 104(c) of the 1969 Act. In interpreting the meaning of this provision under the 1969 Act, the former Interior Board of Mine Operations Appeals in Eastern Associated Coal Corporation, 3 IBMA 331 (1974), took a rather restrictive view of the test of "significant and substantial" when it held that a violation could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if the evidence shows that the condition or practice cited as a violation posed a probable risk of serious bodily harm or death, 3 IBMA 355. The Board noted that "if we thought that the hazard in question had only a speculative possibility of occurring, we would of course conclude otherwise." (Emphasis added.)

In Zeigler Coal Company, 4 IBMA 139 (1975), the Board reexamined its prior interpretation of the term "significant and substantial" and characterized it as a "phrase of art," 4 IBMA 154; and at 4 IBMA 156 stated as follows:

> If we were to give each of the words of that clause an ordinary meaning, it would become a superfluous truism; by definition, the violation of any mandatory standard could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. However, since it is plain that the Congress intended by these words to enact one of several discriminating criteria designed to separate those violations that merit 104(c) treatment from those that do not, such a literal interpretation would be squarely at odds with the apparent congressional intent. Such interpretation would render the phrase nugatory when the Board is obliged under the usual norms of statutory construction to give meaning to all the terms of a statute. Sutherland, Statutes and Statutory Construction, § 46.06 (4th ed. 1973).

Commenting on its prior Eastern Associated Coal Corporation decision, the Board stated further at 4 IBMA 160, 161:

> Against this background and in order to give effect to all the statutory terms, we held and still believe that the clause "* * * could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *" is a phrase of art. The key word of that clause is "hazard" which in our view refers not to just any violation, but rather to violations posing a risk of serious bodily harm or death. The part of the clause which reads "* * * could significantly and substantially contribute to the cause and effect * * *" states a probability requirement, designed in our opinion, to prevent application of section 104(c) to largely speculative "hazards."

In Alabama By-Products Corporation, 6 IBMA 168 (1976), the Board affirmed a judge's decision vacating two section 104(c)(1) withdrawal orders issued pursuant to the 1969 Act. The judge held that the underlying notice was improperly issued because the violation cited did not pose a "probable risk of serious bodily harm or death" and therefore did not meet the "significant and substantial" test previously laid down in Eastern and Zeigler. In affirming the judge's decision, the Board rejected the UMWA arguments that the definition of "significantly and substantially" should be given its ordinary meaning which needs no definition and that the Board's construction of the term only deters the violation of a few of the mandatory health and safety standards while the UMWA's "ordinary meaning" construction of the term would deter violations of many more mandatory standards.

In Alabama By-Products Corporation, 7 IBMA 85, November 23, 1976, the Board reconsidered its prior determinations and construction of the term "significant and substantial," and it did so on the basis of the D.C. Circuit Court of Appeals' decision in International Union, United Mine Workers of America (UMWA) v. Kleppe, 532 F.2d 1403 (1976), cert. denied, sub nom. Bituminous Coal Operators' Association, Inc. v. Kleppe, 429 U.S. 858 (1976), reversing Zeigler Coal Company, supra, and holding that there was no implied gravity prerequisite for the issuance of a section 104(c)(1) withdrawal order. Noting the asserted narrowness of the court's holding and its silence on the Board's construction of "significant and substantial," the Board nevertheless held that the court's opinion had broader implications and compelled a change in the Board's prior construction, and it stated as follows at 7 IBMA 92:

> The reason that the appellate court's holding and supporting reasoning is important here is quite simply that our construction of the "significant and substantial" language in section 104(c)(1) was the product of virtually the same reasoning that the Court rejected in reversing Zeigler. When we construed that language to mean "probable risk of serious bodily harm or death," we disregarded the plain semantical meaning of that phrase in favor of a more restrictive reading of the statutory words which fitted in with our overall concept of the enforcement scheme. The emphasis of the D.C. Circuit on literalism which promotes wider operator liability and its rejection of our holding and the underlying reasoning in support thereof have undermined the "probable risk" test completely. An honest reading of the Court's opinion thus compels us to overrule Eastern Associated Coal Corp. * * *, and Zeigler Coal Company, * * * insofar as they validate the "probable risk" test. [Footnote omitted.]

The Board's reconstructed interpretation of the term "significant and substantial," as enunciated in its second Alabama By-Products' decision, is set forth at 7 IBMA 94 as follows:

> Section 104(c)(1), it should be recalled, mandates the issuance of a notice when an inspector finds that "* * * a

> violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *." Our position now is that these words, when applied with due regard to their literal meanings, appear to bar issuance of notices under section 104(c)(1) in two categories of violations, namely, violations posing no risk of injury at all, that is to say, purely technical violations, and violations posing a source of any injury which has only a remote or speculative chance of coming to fruition. A corollary of this proposition is that a notice of violation may be issued under section 104(c)(1) without regard for the seriousness or gravity of the injury likely to result from the hazard posed by the violation, that is, an inspector need not find a risk of serious bodily harm, let alone of death. [Emphasis in original.]

Commenting on the enforcement ramifications of its new interpretation, the Board stated as follows at 7 IBMA 95:

> The inspector's judgment as to whether a given violation is "* * * of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *" must be reasonable. The reasonableness of such a judgment is dependent upon the peculiar facts and circumstances of each case, and it is up to an Administrative Law Judge initially, and the Board ultimately, to determine whether an inspector was reasonable in so finding in any given case.
>
> We recognize that our interpretation today means that federal coal mine inspectors have a very wide area of discretion to issue section 104(c) notices with all the attendant liability to summary withdrawal orders which necessarily follows upon even the most trivial of violations after issuance of such a notice. However, with the present controversy is viewed in the reflected light cast by the D.C. Circuit on section 104(c) in UMWA v. Kleppe, supra, no other conclusion can sensibly be drawn.

Considering the foregoing judicial evolution of the construction of the term "significant and substantial," I conclude and find that practically all or most violations occurring at a mine are of a "nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard," except in two categories:

1. Those violations which pose no risk of injury at all, such as the so-called "purely technical violations"; and

2. Those violations which pose a source of injury which has only a remote or speculative chance of happening.

Further, it also seems clear that the term can apply to a violation without regard to the seriousness or gravity of any injury for which the violation poses a risk of occurrence, that is, there need not be a finding that the violation poses a risk of serious bodily injury or death for the term to apply.

The present construction of the term "significant and substantial" as it evolved in the aforementioned cases is favorably reflected in the legislative history of the 1977 Act as follows:

> The Interior Board of Mine Operations Appeals has until recently taken an unnecessarily and improperly strict view of the "gravity test" and has required that the violation be so serious as to very closely approach a situation of "imminent danger", Eastern Associated Coal Corporation, 3 IBMA 331 (1974).
>
> The Committee notes with approval that the Board of Mine Operations Appeals has reinterpreted the "significant and substantial" language in Alabama By-Products Corp., 7 IBMA 85, and ruled that only notices for purely technical violations could not be issued under Sec. 104(c)(1).
>
> The Board there held that "an inspector need not find a risk of serious bodily harm, let alone death" in order to issue a notice under Section 104(c)(1).
>
> The Board's holding in Alabama By-Products Corporation is consistent with the Committee's intention that the unwarranted failure citation is appropriately used for all violations, whether or not they create a hazard which poses a danger to miners as long as they are not of a purely technical nature. The Committee assumes, however, that when "technical" violations do pose a health or safety danger to miners, and are the result of an "unwarranted failure" the unwarranted failure notice will be issued.

S. Rep. No. 181, 95th Cong., 1st Sess., 31 (1977).

Docket No. PITT 79-210

Citation No. 229432, 30 CFR 77.1607(cc)

30 CFR 77.1607(cc) states as follows: "Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length."

The citation issued in this case charges that the No. 1 wash belt was not provided with emergency stop devices or cords along the belt walkway. The inspector testified that he issued the citation because the conveyor belt in question is required to have an emergency stop pull cord along the *full length of the walkway* where a person might be exposed to the moving belt rollers and the belting itself (Tr. 12). He described the belt as being inclined from inside the plant to the outside, that it had an inclined *walkway* along its *full length* from ground level to the head roller, and that the purpose of the belt was to carry washed coal from inside the plant to the outside where it was loaded (Tr. 13). He estimated the length of the belt to be 125 to 150 feet, and indicated that the *walkway* was to the right of the belt and that it was composed of expanded metal, and while he looked out of the window of the control room inside the plant, he could not recall whether he could see the entire belt length (Tr. 23-24). He observed one around or on the belt, made no inquiries as to whether anyone is required to be in the belt area while it was running, and did not know whether the plant maintenance schedule provided for work and lubrication of the belt while it was running (Tr. 25). The belt tail roller was guarded, and the head roller was guarded by location because the walkway only went up to the front of it (Tr. 41).

The unguarded portion of the belt which concerned the inspector consisted of the idler rollers and the belting itself (Tr. 42). The stop cord was a suitable substitute for a physical guard, and a person would have access to the stop cord to shut the belt off as he was falling into it (Tr. 43). He believed that under certain conditions it would be a hardship on an operator to require a physical guard along the entire length of the belt, but the installation of a stop cord is not such a hardship (Tr. 44). The walkway was in fairly good condition and he observed no spillage (Tr. 46).

Mine Manager DiBiase testified that the so-called belt "walkway" was in fact a work area or platform which was parallel to the ground and did not run along the same incline as the belt (Tr. 53, 58, 65, 66; ALJ Exh. 1). The exposed unguarded portion of the belt was at the point where the inclined belt intersected the platform and the belt did not have a walkway adjacent to its entire length (Tr. 66, 68). He assumed that it was what the inspector had in mind when he cited the violation (Tr. 72).

In an attempt to resolve the discrepancy in the testimony concerning the existence of the alleged conveyor belt *walkway*, Inspector Felichko was recalled in rebuttal. His testimony in rebuttal reflects that the walkway he previously described as being along the entire length of the conveyor belt was in fact the *platform area* described by Mr. DiBiase (Tr. 80; Exh. M-3(a)), and he indicated that the walkway was not adjacent and parallel to the belt along its entire length (Tr. 81). MSHA's counsel believed that the inspector had in mind a *portion* of the belt near the platform and counsel conceded that his testimony was confusing (Tr. 82, 83). The inspector added to the confusion when he indicated that the platform "ran parallel with the belt," and that one "could walk along that platform and be next to this belt for the full length of the walkway" (Tr. 84).

After careful review and consideration of the testimony presented with respect to this citation, I conclude and find that the inspector was confused as to what he actually observed on the day the citation issued. While his direct testimony clearly indicated to me that there was a walkway along the entire length of the conveyor belt which was not guarded by a stop cord and that he was concerned that someone walking that walkway could possibly trip or fall into the belt and become caught in a belt idler roller, it turns out that what he apparently had in mind was an exposed unguarded belt area at a point where the belt intersected a work platform which was apparently used as a maintenance station and as a belt crossover point. Subsection (cc) of section 77.1607 requres the installation of stop cords on conveyors equipped with walkways. In this case, I cannot conclude that the conveyor belt in question had a walkway along its full length which exposed anyone to a possible hazard, and I find that MSHA has not established that this was in fact the case. I accept Mr. DiBiase's testimony as credible and find that MSHA has failed to establish by any credible evidence that the belt conveyor in question had a walkway. This being the case, I find that the cited standard does not apply in the situation here presented and the citation is VACATED.

Docket No. PITT 79-211

Citation No. 229433, 30 CFR 77.701

30 CFR 77.701 provides as follows: "Metallic frames, casings, and other enclosures of electric equipment that can become 'alive' through failure of insulation or by contact with energized parts shall be grounded by methods approved by an authorized representative of the Secretary."

Contestant admitted that the shop area switchbox in question was not frame grounded as charged in the citation (Tr. 118; Brief, p. 5). Its defense is that another suitable means for grounding the box was used and Mine Manager DiBiase's testimony that the absence of the frame ground would not make the likelihood of an accident imminent. This defense is rejected. Mr. DiBiase candidly admitted that the lack of a frame ground could contribute to a possible accident, and he also indicated that he had removed tool grounds in the past even though he realized he was jeopardizing his health and life (Tr. 116, 117). As for the alternative use of a ground to the fuse, Mr. DiBiase admitted that this was not a proper ground.

The inspector testified that the 110-volt circuit was energized, there was no insulation mat on the floor, and the floor was muddy and wet, and coupled with what he described as "frayed" outer insulation of the cables, he believed that there was a shock or electrocution hazard presented by the condition cited. Under fault conditions, the box could become energized, and the inspector believed that the lack of a frame ground, aggravated by the frayed outer cable insulation, constituted a significant and substantial violation. In addition, the box was located in a shop area by an entrance door and one could just walk up to it (Tr. 89).

I find that MSHA has established the fact of violation and I also find that the violation was not technical. To the contrary, I find that the lack of a proper frame ground, coupled with the other prevailing conditions and the proximity of the box at the entrance of the shop, presented a real shock and electrocution hazard which could have resulted in serious injuries or death and the absence of the frame ground increased the likelihood of those events happening. Accordingly, I conclude that the violation was significant and substantial, and the citation is AFFIRMED.

Docket No. PITT 79-212

Citation No. 229434, 30 CFR 77.513

30 CFR 77.513 states as follows:

> Dry wooden platforms, insulating mats, or other electrically nonconductive material shall be kept in place at all switchboards and power-control switches where shock hazards exist. However, metal plates on which a person normally would stand and which are kept at the same potential as the grounded, metal, non-current-carrying parts of the power switches to be operated may be used.

Contestant does not dispute the fact that there was no insulation at the switchbox in question (Tr. 117; 118; Brief, p. 6). The box in question was the same one for which the inspector issued Citation No. 229433 for lack of a proper frame ground. The inspector believed the violation was significant and substantial because the lack of an insulation mat aggravated or added to the potential for a shock or electrocution, particularly in light of the prevailing conditions such as a wet and muddy floor, lack of a frame ground on the box, and the frayed cable which he described (Tr. 107). I agree with the inspector and find that the violation has been established and that it was significant and substantial and not technical. The citation is AFFIRMED.

Docket No. PITT 79-213

Citation No. 229362, 30 CFR 77.205(e)

30 CFR 77.205(a) and (e) provide as follows:

> (a) Safe means of access shall be provided and maintained to all working places.
>
> * * * * * * * *
>
> (e) Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary toeboards shall be provided.

The citation (Exh. M-12) charges the contestant with a violation of subsection (a) of section 77.205 for failure to provide and maintain a safe means of access to the working place in that the end of a third level walkway of the preparation plant was not protected by a railing, barrier, or other protective device. By motion filed on December 12, 1979, 2 months after the evidentiary hearing, MSHA seeks to amend its pleadings to reflect a citation of subsection (e) rather than (a). In support of its motion, MSHA asserts that the original citation described with particularity the conditions and practices which constitutes a violation of subsection (e), that contestant was in fact informed of the violation and is not unduly prejudiced, and that Rule 15(b) of the Federal Rules of Civil Procedure liberally permits a party to amend its pleadings to conform to the evidence.

The inspector's testimony is somewhat confusing as to what he intended to cite, and what he apparently had in mind was the fact that the surface area of an elevated platform or balcony in the preparation plant did not have a protective barrier or barricade installed at one end of the edge so as to preclude someone from falling off the next level below for a distance of some 7 feet. The area in question was approximately 3-1/2 feet wide, with a wall on one side and plant machinery on the other. Access to the platform was gained by a stairway leading up from the level below the area cited. Although subsection (e) specifically requires the installation of handrails, the inspector testified that he would have accepted a removable chain rail, barricade, wire, boarding or a partition as compliance, and he likened the hazard presented to someone walking off the end of an apartment balcony (Tr. 138, 152). It seems obvious to me from his testimony, and from the way the condition is described on the face of the citation, that the inspector intermingled the requirements of subsections (a) and (e). Stated another way, he apparently intended to apply a standard which would read: "Safe means of access shall be provided and maintained to all working places, and in the case of elevated walkways or working places where work is to be performed, compliance shall be achieved by the installation of a handrail or other substantial barrier." The problem with this is that the inspector's function is not to rewrite safety standards. His function is to cite conditions or practices which he believes constitutes a violation of a standard as promulgated.

MSHA's counsel indicated that the substance of the citation deals with subsection (e) in that the inspector was concerned that someone would fall off the unprotected edge of the elevated platform where there was room for him to walk up to the edge (Tr. 138, 150-151), and the inspector attempted to clarify his position when he testified that:

> My interpretation and understanding of safe means of access is that a man can travel in that working area, and a safe means of access to that working area is that he can travel through that working area, and that is the whole working area, in safety without falling off the end (Tr. 153).

The inspector conceded that there was a safe means of access up to the point of the end of his trip when he falls off the edge (Tr. 153).

Contestant has filed no response or opposition to MSHA's motion to amend, nor did it raise any objection at the hearing during the colloquy and questioning of the inspector by the parties. As correctly pointed out by MSHA in its motion, Rule 15(b) of the Federal Rules of Civil Procedure is liberally construed, and in a case decided under the Occupational Health and Safety Act, National Realty Company, Inc. v. Occupational Safety and Health Review Commission, 489 F.2d 1257 (D.C. Cir. 1973), the court observed as follows at 489 F.2d 1264:

> So long as fair notice is afforded, an issue litigated at an administrative hearing may be decided by the hearing agency even though the formal pleadings did not squarely raise the issue. This follows from the familiar rule that administrative pleadings are very liberally construed and very easily amended. The rule has particular pertinence here, for citations under the 1970 Act are drafted by non-legal personnel, acting with necessing dispatch. Enforcement of the Act would be crippled if the Secretary were inflexibly held to narrow construction of citations issued by his inspectors.

Amendments of pleadings to conform to the evidence is one thing, but attempts to rewrite or reissue citations is another. On the facts here presented, it seems obvious that MSHA's motion seeks to amend the citation to reflect a violation of subsection (e) rather than (a). In effect, MSHA is seeking to issue a new citation so as to take advantage of the inspector's oral testimony which I believe supports neither a violation of subsections (a) or (e) of section 77.205. See Tilden Coal Company, 7 IBMA 57 (1976). On the facts presented in this case, it seems obvious to me that the inspector confused the two subsections since the narrative portion of the condition or practice as described on the face of the citation parrots the exact requirements of subsection (a); that is, the inspector did not believe a safe means of access was provided to the working place because of the lack of a railing on the so-called "walkway." However, the evidence establishes that the only access to the platform was by means of the stairway from the lower level up to the platform and there is no evidence that the stairway was unsafe. Further, in response to a question as to whether the area cited was a travelway used by personnel as a means of going through the plant, the inspector answered "[i]t is not a communication travelway, a necessary communication travelway," and he indicated that part of the reason for the structure being there was for maintenance purposes (Tr. 140).

The term "working place" is not further defined by Part 77. However, I believe it is reasonable to conclude that since work is performed on the platform area in question from time-to-time, that the area may be considered a working place for purposes of subsection (a) of section 77.205. However, since I have concluded that MSHA has not established by any credible evidence that access to that area was unsafe, I also find that a violation of that subsection has not been established.

With regard to the application of subsection (e) of section 77.205, I am not convinced by any credible evidence that the area cited was in fact a walkway within the meaning and intent of the standard. The area cited was more of a platform and work station used for maintenance purposes and it was not a walkway used by employees to travel in and through the plant and the inspector candidly admitted as much. It seems obvious to me that the inspector attempted to apply a standard which simply does not fit the factual circumstances here presented. The protection of personnel from falling from unprotected elevated work platforms and work stations appears to be a most obvious situation which should be covered by a mandatory standard, and subsection (b) of section 77.205 comes close. However, that standard only requires the area to be kept clear of stumbling or slipping hazards and by including it among "travelway" standards, its application becomes all the more confusing. It seems to me that if MSHA desires to provide barriers and other protective devices to prevent personnel from falling off an elevated platform, it should promulgate a precise standard to cover that situation. In the instant case, the inspector attempted to apply a walkway handrail requirement to a factual situation which I believe is not covered by that requirement, and the inspector's acknowledgement that he would accept chains, wires, boards, or partitions as suitable barricade substitutes for the handrail emphasizes my point. Subsection (e) on its face only requires handrails, and what may suit one inspector as suitable for compliance may not suit another. I find that MSHA has not established that the area cited was in fact a walkway within the meaning and intent of subsection (e), and that it has not established a violation of that standard.

Since I have found that MSHA has failed to establish a violation of either subsections (a) or (e) of section 77.205, its motion to amend its pleadings is moot. However, even if I were to grant it, I would limit it to permit MSHA to amend its pleadings to the extent that it wishes to cite subsection (e) rather than (a), but would not permit MSHA to reissue or reconstruct the condition or practice cited by the inspector. In the final analysis, I conclude that MSHA is bound by the conditions or practices described by the inspector on the face of his citation and that MSHA has failed to establish a violation of either subsection (a) or (e). The citation is VACATED.

Docket No. PITT 79-214

Citation No. 229363, 30 CFR 77.400(c)

30 CFR 77.400 provides as follows:

> (a) Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

(b) Overhead belts shall be guarded if the whipping action from a broken line would be hazardous to persons below.

(c) Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

(d) Except when testing the machinery, guards shall be securely in place while machinery is being operated.

Fact of Violation

The citation (Exh. M-15), and the inspector's testimony (Tr. 157), clearly indicates that the inspector cited subsection (c) of section 77.400 as the alleged violation. However, that subsection requires that guards at conveyor heads be extended for a sufficient distance to prevent a person from reaching behind it and becoming caught between the belt and the pulley. In my view, this subsection is applicable in a situation where a guard is already installed but does not adequately provide protection. The citation here was issued because no guard was provided at the drive head location and contestant does not dispute this fact. Under the circumstances, the inspector should have cited subsection (a) which specifically requires that head pulleys be guarded. However, the fact that he did not does not in my view vitiate the citation. Although each subsection of section 77.400 constitutes a separate requirement and may serve as the basis of separate citations, in this case, contestant is charged with one violation of section 77.400(c), and since the head pulley had no guard at all installed, I believe the facts support a finding of a violation. In addition, contestant does not claim prejudice or surprise, knew what it was charged with, abated it, had an ample opportunity to present its defense, and does not dispute the fact that the head pulley was not guarded. In the circumstances, I find that MSHA has established a violation.

Was the Violation Significant and Substantial

MSHA's support for a finding of a significant and substantial violation rests on its assertion that a worker's limb could become entangled between the belt and metal roller, the existence of pinch points at the entry of the belt over the drive head roller, and the inspector's belief that a worker could reach straight into the drive head or inadvertently fall in and seriously injure himself. Since the belt was operable, MSHA argues that all that was necessary to energize it was to push a button.

Mine Manager DiBiase testified that the belt in question is not frequently used, that one cannot inadvertently trip into the pinch point, and that the belt is locked out with a lock when maintenance is being performed (Tr. 174). He installed guards where he believed they were required, and in the 20 years the plant has been in operation and inspected, no one has ever advised him that the location cited required a guard. He conceded that the conveyor belt did not have a guard, but indicated that the gear box sprocket to the drive motor on the head pulley was guarded and the inspector agreed this was the case (Tr. 179-180).

Contrary to MSHA's assertion that a person could reach straight into the drive head, the inspector's testimony is that one would have to stand and extend himself into the area, that it was within his extended reach, and that he is 5 feet 11 inches tall (Tr. 162). His testimony reflects that one would have to deliberately reach into the pinch point while performing work there and that one would not inadvertently get caught in the pinch point unless he fell or tripped (Tr. 163-164). In addition, the gravity portion of the inspector's statement prepared at the time the citation issued (Exh. M-17) contains a notation by the inspector that the belt in question was "seldom used" and that the occurrence of the event against which the cited standard is directed was "improbable." He also indicated that one person would be affected if the event occurred or were to occur, and he described the "event" which would have to occur before an accident would have resulted from the violation as "a miner would have to be caught between the belt and the drive pulley." Further, as to the presence of any conditions or circumstances which might have increased the likelihood or severity of that happening, he indicated "none." When asked about these notations, the inspector conceded that the belt was seldom used, that it was not in operation at the time the citation issued, and he justified his significant and substantial finding by the fact that "there was less chance of a man becoming involved, although there was always a chance of a man becoming involved," and the fact that "something could happen if someone inadvertently got their hand caught in the pinch point" (Tr. 160, 170). MSHA's counsel conceded that all citations issued for unguarded belt drive pulleys are not necessarily, and as a general rule, significant and substantial (Tr. 181).

After careful consideration of the inspector's testimony with respect to this citation, I cannot conclude that the violation was significant and substantial. To the contrary, based on the totality of the prevailing conditions at the time the citation issued, I find that the hazard presented by the unguarded conveyor drive head pulley presented a situation which at most exposed miners to a remote or speculative possibility of an accident occurring. The evidence establishes that chain guards were installed at the gear box head pulley drive, the gear sprocket guard was properly guarded, contestant's evidence that the belt is locked out before maintenance is performed is unrebutted, the belt was seldom used and was not in operation, the inspector believed that an injury was improbable, and the probability of someone falling into the precise pinch point, which was at an extended vertical reach approximating 6 feet is remote. Under the circumstances, I conclude that the violation was not significant and substantial.

ORDER

All briefs and proposed findings and conclusions filed by the parties have been considered, and to the extent they are inconsistent with the foregoing findings and conclusions, they are rejected. In view of my findings and conclusions made herein, IT IS ORDERED THAT:

1. Citation No. 229432, February 22, 1979, issued in Docket No. PITT 79-210, is VACATED.

2. Citation No. 229433, February 22, 1979, issued in Docket No. PITT 79-211, is AFFIRMED as a significant and substantial violation.

3. Citation No. 229434, February 22, 1979, issued in Docket No. PITT 79-212, is AFFIRMED as a significant and substantial violation.

4. Citation No. 229362, February 22, 1979, issued in Docket No. PITT 79-213, is VACATED.

5. Citation No. 229363, February 22, 1979, issued in Docket No. PITT 79-214, is AFFIRMED, but the violation is not significant and substantial.

George A. Koutras
George A. Koutras
Administrative Law Judge

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Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JAN 29 1980

FMC CORPORATION,	:	Notice of Contest
Applicant	:	
v.	:	Docket No. WEST 79-419-RM
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Citation No. 575882; August 24, 1979
Respondent	:	FMC Mine

ORDER APPROVING SETTLEMENT AND DISMISSING THE PROCEEDING

On September 24, 1979, FMC Corporation (Applicant) filed a notice of contest in the above-captioned proceeding pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (1978). Subsequent thereto, an answer was filed by the Mine Safety and Health Administration (MSHA).

Pursuant to notices of hearing, the hearing convened at 1 p.m., Tuesday, November 6, 1979, in Salt Lake City, Utah, at which time counsel for both parties apprised the Judge that a settlement had been negotiated in the form of an agreement by the Applicant to withdraw its notice of contest in return for certain stipulations.

The agreement was filed subsequent to the hearing in the form of a document styled "stipulation of settlement and joint motion to approve settlement agreement." This document, filed on January 7, 1980, states the following:

> Applicant and respondent, by and through their respective counsel of record, hereby stipulate to the following facts and agree as follows:
>
> 1. On August 24, 1979, an inspector of the Mine Safety and Health Administration ("MSHA"), United States Department of Labor, issued Citation No. 0575882 to FMC Corporation for violation of the Health and Safety Standard contained in 30 C.F.R. §57.4-29 ("Standard 4-29").
>
> 2. MSHA has not and does not intend to interpret Standard 4-29 to require that fire extinguishing equipment be located within arm's length of a welder during all welding

and cutting operations regardless of the fire hazard, or lack thereof, presented by all circumstances at the work site.

3. MSHA intends to use as a guideline for the enforcement of Standard 4-29 that fire extinguishing equipment should be located within 50 feet of a welder during welding and cutting operations unless the familiarity of the welder with fire extinguishing equipment locations or an immediate fire hazard peculiar to the work site warrants a closer placement of the fire extinguishing equipment.

4. Citation No. 0575882 issued by MSHA Inspector William W. Potter on August 24, 1979, was properly issued based upon the facts then known to the inspector. Additional facts, however, have subsequently been made known to MSHA which demonstrate that FMC Corporation was in compliance with the application and guidelines described in Paragraphs 2 and 3 above at the time the Citation was issued. Therefore, it now appears that Citation No. 0575882 should be withdrawn.

5. FMC Corporation hereby agrees to withdraw its Notice of Contest.

6. MSHA hereby agrees to withdraw Citation No. 0575882. Based upon the foregoing Stipulation, the parties jointly move the Commission to approve this Settlement Agreement.

Based on the representations made by counsel for the parties, it appears that a disposition approving the settlement will adequately protect the public interest. Accordingly, the settlement negotiated by the parties is herewith APPROVED and the above-captioned proceeding is herewith DISMISSED.

John F. Cook
Administrative Law Judge

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UNITED STATES OF AMERICA

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

JAN 29 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING
v.	DOCKET NO. WEST 79-193-M
BRUBAKER-MANN, INCORPORATED, Respondent.	ASSESSMENT CONTROL NO. 04-00030-05001 MINE NAME: BRUBAKER-MANN QUARRY AND MILL

DECISION

APPEARANCES:

Linda R. Bytof, Esq. and Marshall P. Salzman, Esq., Office of Daniel W. Teehan, Regional Solicitor, United States Department of Labor, San Francisco, California,
for the Petitioner,

Jennifer Mann and William J. Mann, of Barstow, California, appearing pro se,
for Respondent.

Before: Judge John J. Morris

Respondent is charged with failing to guard the edge of its elevated access road, with failing to barricade a walkway, and with failing to require the use of a safety belt at its grizzly dump. Petitioner contends these conditions violate standards promulgated under the authority of the Federal Mine Safety and Health Amendments Act of 1977, (30 U.S.C. 801 *et seq*).

ISSUES

The issues are whether the violations occurred; whether the fines adversely affect respondent; whether "instant fines" are legally permissible and finally, whether the California Occupational Safety and Health Administration (CAL-OSHA) pre-empts the Federal Mine Safety and Health Administration (MSHA).

CITATION 376433

This citation alleges a violation of 30 CFR 56.9-22. [1/]

The uncontroverted evidence on this issue establishes the following facts.

1. Respondent's front end loaders use an elevated access road, 25 to 30 feet wide, to reach a diesel pump (Tr 14-16, R1).

2. There is a 25 foot drop off within 6 feet of the pump (Tr 16-19).

3. The roadway lacks berms or guards on its outer edge (Tr 15).

4. A berm or guard consists of material such as rocks or dirt that could restrain a vehicle from overturning or from rolling off of an elevated roadway (Tr 15).

This citation should be affirmed.

Respondent asserts it abated the condition and that no accidents have occurred on its road. Further, respondent contends the compliance officer admitted being unfamiliar with the safety devices on the truck.

I reject these arguments.

Abatement of a violation is an element to be considered in assessing a penalty under the Act, [2/] but subsequent abatement cannot excuse prior noncompliance.

The mere fact that no accidents have occurred is not dispositive of whether respondent violated the standard. The purpose of a safety regulation is to prevent the first accident, Lee Way Motor Freight, Inc. v. Secretary of Labor, 511 F.2d 864 (10th Cir., 1975).

[1/] The standard provides as follows:

> 56.9-22 Berms or guards shall be provided on the outer bank of elevated roadways.

[2/] Section 110(i), 30 U.S.C. 820(i).

Respondent's argument concerning safety devices on the vehicles is likewise rejected. Guardrails would be a safety feature completely apart from any safety devices on the truck.

CITATION 346434

This citation alleges a violation of 30 CFR 56.11.2. [3/]

The evidence is conflicting and I find the following facts on this citation.

5. Respondent's bulk tank is constructed from an old railroad car; it sits 35 feet high (Tr 22-23, R-2).

6. There was no reason for anyone to be on the top of the bulk tank; the operator diverts materials from a guarded railed platform (Tr 54-55).

7. Respondent's president had never seen an employee on top of the tank (Tr 56).

This citation should be vacated. There is sufficient evidence in petitioner's case to infer that workers used the walkway (Tr 27-28), but this directly conflicts with the testimony of the quarry operator. Inasmuch as the operator should be more familiar with his company's work activities, I find his testimony more credible than that of the inspector.

Petitioner's post trial brief argues those facts most favorable to his position. However, as indicated, I have rejected those facts for the reasons stated.

[3/] The standard provides as follows:

> 56.11-2 Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

CITATION 376435

This citation alleges a violation of 29 CFR 56.15-5. [4]

The evidence is uncontroverted.

8. A front end loader moves limestone to the grizzly dump (Tr 30, R3, R4)

9. A set of grizzlies are rails 7 to 8 feet long and set 13 1/4 inches apart. The grizzlies are 4 to 5 feet above a conveyor which moves material (Tr 30-3

10. A worker, without a safety belt and life lines, pushes the rock through the grizzly dump opening. If the pieces are too large, the worker breaks them up with a sledge hammer (Tr 30).

11. If a person fell through the grizzlies, he would fall onto a conveyor moving toward a crusher (Tr 31).

This citation should be vacated. The gravamen of this citation revolves on the single issue of whether a worker could fall through the 13 1/4 inch grizzly opening.

The evidence is in conclusory form. Petitioner's evidence show that a normal size worker could fall through this space (Tr 31, 71); however, respondent shows that the crusher operator could not fall through the opening (Tr 63). The evidence is at best evenly balanced. Accordingly, the petitioner has not sustained his burden of proof.

CIVIL PENALTIES

Respondent contends that harassment, fines, paperwork, and the like, will make it so costly to produce its product that it can no longer remain in business. [5] Further, respondent contends "instant fines" are unjust.

---

[4] This standard provides as follows:

> 56.15-5 Safety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

[5] The proposed penalty for the citation not vacated is $84.

I reject these arguments. Respondent presented no evidence in support of its "harassment" argument. The inspection appears to be of a routine nature to which members of the regulated industry are subjected.

In addition, the imposition of civil penalties in furtherance of the congressional policies is generally constitutional. Frank Irey, Jr., Inc. v. OSHRC 519 F.2d 1200 Cert granted-affirmed 97 S. Ct. 1261, 430 U.S.C. 442.

Respondent alleges the imposition of "instant fines" is unjust. Respondent's views overlook the pertinent provisions of the Federal Mine Safety and Health Amendments Act of 1977. Under Section 110(i) [6/] the Commission has the authority to assess "all civil penalties" provided in the Act. The "instant fines" referred to by the respondent are, in law, merely proposals of MSHA.

CAL-OSHA JURISDICTION

Respondent's contention that the California Occupational Safety and Health Act pre-empts the Mine Safety and Health Act lacks merit.

CAL-OSHA derives its authority from the Federal Occupational Safety and Health Act (29 U.S.C. 651 et seq). That legislation applies generally to employers engaged in a business affecting commerce. 29 U.S.C. 652(5).

The Federal Mine Safety and Health Act derives its authority from the Federal Mine Safety and Health Amendments Act of 1977. 30 U.S.C. 801 et seq. The latter Act defines in part a "coal or other mine" as an area of land from which minerals are extracted. 30 U.S.C. 802(h)(1).

Inasmuch as the Federal Mine Safety Act is more specific as it relates to miners, it is applicable over the more general statute.

[6/] 30 U.S.C. 820(i)

FINDINGS OF FACT

I find the facts as outlined in paragraphs 1 through 11 of this decision.

CONCLUSIONS OF LAW

1. Respondent violated 30 CFR 56.9-22 and Citation 376433 should be affirmed (Facts 1, 2, 3, 4).

2. Petitioner failed to prove a violation of 30 CFR 56.11-2 and Citation 346434 should be vacated (Facts 5, 6, 7).

3. Complainant failed to prove a violation of 30 CFR 56.15-5 and Citation 376435 should be vacated (Facts 8, 9, 10, 11).

Based on the foregoing findings of fact and conclusions of law, I enter the following:

ORDER

1. Citation 376433 and the proposed penalty of $84 are affirmed.
2. Citation 346434 and all penalties therefor are vacated.
3. Citation 346435 and all penalties therefor are vacated.

John J. Morris
Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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JAN 30 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	Civil Penalty Proceedings Docket No. BARB 79-219-PM A/O No. 09-00231-05001
v.	Docket No. BARB 79-280-PM A/O No. 09-00231-05003
FREEPORT KAOLIN COMPANY, Respondent	Docket No. BARB 79-281-PM A/O No. 09-00231-05004
	Docket No. BARB 79-282-PM A/O No. 09-00231-05002
	Griffin Mill

DECISION

Appearances: Thomas P. Brown IV, Esq., W. Thomas Truett, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Gene B. Strouss, Personnel Manager, Freeport Kaolin Company, Gordon, Georgia; and Alexander E. Wilson III, Esq., and Thomas J. Hughes, Jr., Esq., Jones, Bird & Howell, Atlanta, Georgia, for Respondent.

Before: Judge Cook

I. Procedural Background

The Mine Safety and Health Administration (MSHA) filed petitions for assessment of civil penalty against Freeport Kaolin Company (Freeport) in the above-captioned cases pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1978) (1977 Mine Act). The petition in Docket No. BARB 79-219-PM was filed on January 17, 1979. The petitions in the remaining cases were filed on February 9, 1979. Freeport filed its answer in Docket No. BARB 79-219-PM on February 21, 1979, and filed answers in the remaining cases on March 12, 1979.

An order was issued on June 8, 1979, consolidating the above-captioned cases for hearing and decision. Pursuant to notice of hearing issued on June 5, 1979, a hearing on the merits was conducted on June 21 and June 22, 1979, in Macon, Georgia. Representatives of both parties were present and participated. During the course of the hearing, the representatives of the parties informed the undersigned Administrative Law Judge that a settlement had been reached as relates to three of the alleged violations in Docket No. BARB 79-281-PM and as relates to five of the alleged violations in Docket No. BARB 79-282-PM. The motion to approve settlement pertaining to those eight alleged violations was filed on October 22, 1979. A decision and order approving the proposed settlements is included herein.

A schedule for the submission of posthearing briefs was agreed upon at the conclusion of the hearing. The original briefs were to be filed simultaneously by both parties on August 22, 1979, with reply briefs due on September 6, 1979. On August 21, 1979, counsel for the Respondent requested a 30-day extension of time from August 22, 1979, for the filing of its brief, which request was granted by an order dated August 22, 1979. Under the revised schedule, both parties were accorded until September 21, 1979, to file their briefs, with reply briefs due on October 5, 1979. MSHA and Freeport filed their posthearing briefs on September 24, 1979, and September 25, 1979, respectively. No reply briefs were filed. The final filing of information necessary to consider approval of settlement in Docket Nos. BARB 79-281-PM and BARB 79-282-PM occurred on December 27, 1979.

II. Violations Charged

A. Docket No. BARB 79-219-PM

Citation No.	Date	30 CFR Standard
96161	July 20, 1978	55.12-16

B. Docket No. BARB 79-280-PM

Citation No.	Date	30 CFR Standard
96162	July 20, 1978	55.14-26
96173	July 25, 1978	55.14-1
96174	July 25, 1978	55.12-30
96179	July 26, 1978	55.12-34
96181	July 26, 1978	55.14-6
96184	July 26, 1978	55.12-30 [1]

C. Docket No. BARB 79-281-PM

Citation No.	Date	30 CFR Standard
96191	July 26, 1978	55.14-1
96194	July 26, 1978	55.12-30*
96200	July 26, 1978	55.14-8(b)*
97202	July 27, 1978	55.12-34*
97205	July 27, 1978	55.4-18

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[1] During the hearing, the Judge granted MSHA's motion to withdraw the petition for assessment of civil penalty as relates to Citation No. 96184, July 26, 1978, 30 CFR 55.12-30 (Tr. 258).

D. Docket No. BARB 79-282-PM

Citation No.	Date	30 CFR Standard
96145	July 18, 1978	55.11-2*
96149	July 18, 1978	55.14-1*
96398	July 18, 1978	55.20-3*
96399	July 18, 1978	55.20-3
96156	July 19, 1978	55.14-1*
96158	July 19, 1978	55.14-1*
96159	July 20, 1978	55.17-1
96160	July 20, 1978	55.17-1

[NOTE: Citations accompanied by an asterisk are encompassed in the October 22, 1979, motion to approve settlement.]

III. Evidence Contained in the Record

A. Stipulations

At the commencement of the hearing, the parties entered into stipulations which are set forth in the findings of fact, infra.

B. Witnesses

MSHA called as its witnesses MSHA inspector Spencer Lindbeck; MSHA supervisory inspector Reino Mattson; and Bruce Dial, an MSHA employee who accompanied Inspector Lindbeck on his July 1978, inspection of Freeport as a trainee.

Freeport called as its witnesses Ronnie D. Amerson, a mechanic's helper for Freeport at the time of the hearing, and who had been the Nos. 8 and 9 dryer operator on July 20, 1978; Paul H. Bacon, vice president and general manager of Freeport at the time of the hearing, and manager of production and shipping in July 1978; William Wharton, Freeport's supervisor of safety and health; Ray Crumbley, Freeport's manager of production and shipping at the time of the hearing, and production superintendent of section No. 1 in July 1978; L. E. Scandlyn, Freeport's maintenance superintendent; and James V. Turner, Jr., the president of Welding Supply and Service Company, Inc.

C. Exhibits

1. MSHA introduced the following exhibits into evidence:

M-1 is a computer printout prepared by the Office of Assessments listing the history of previous violations for which Freeport had paid assessments beginning July 27, 1976, and ending July 27, 1978.

M-2 is a computer printout prepared by the Office of Assessments listing the history of previous violations for which Freeport had paid assessments beginning July 20, 1976, and ending July 20, 1978. 2/

M-3; page 1, is a copy of Citation No. 96161, July 20, 1978, 30 CFR 55.12-16.

M-3, page 2, is a copy of the inspector's statement pertaining to Citation No. 96161.

M-4, page 1, is a copy of Citation No. 96173, July 25, 1978, 30 CFR 55.14-1.

M-4, page 2, is a copy of the termination of Citation No. 96173.

M-4, page 3, is a copy of the inspector's statement pertaining to Citation No. 96173.

M-5, page 1, is a copy of Citation No. 96162, July 20, 1978, 30 CFR 55.14-26.

M-5, page 2, is a copy of the termination of Citation No. 96162.

M-5, page 3, is a copy of a modification pertaining to Citation No. 96162.

M-5, page 4, is a copy of the inspector's statement pertaining to Citation No. 96162.

M-5, page 5, is a copy of a modification of M-5, page 3.

M-6, page 1, is a copy of Citation No. 96174, July 25, 1978, 30 CFR 55.12-30.

M-6, page 2, is a copy of the termination of Citation No. 96174.

M-6, page 3, is a copy of the inspector's statement pertaining to Citation No. 96174.

M-7, page 1, is a copy of Citation No. 96179, July 26, 1978, 30 CFR 55.12-34.

M-7, page 2, is a copy of the termination of Citation No. 96179.

2/ All entries on Exhibit M-2 also appear on Exhibit M-1. All of the violations recorded thereon occurred in July of 1978. Accordingly, the exhibits confirm the parties' stipulation that no evidence exists establishing a history of prior violations.

M-7, page 3, is a copy of the inspector's statement pertaining to Citation No. 96179.

M-8, page 1, is a copy of Citation No. 96181, July 26, 1978, 30 CFR 55.14-1.

M-8, page 2, is a copy of the termination of Citation No. 96181.

M-8, page 3, is a copy of the inspector's statement pertaining to Citation No. 96181.

M-9, page 1, is a copy of Citation No. 96184, July 26, 1978, 30 CFR 55.12-30.

M-9, page 2, is a copy of the termination of Citation No. 96184.

M-9, page 3, is a copy of the inspector's statement pertaining to Citation No. 96184.

M-10, page 1, is a copy of Citation No. 96191, July 26, 1978, 30 CFR 55.14-1.

M-10, page 2, is a copy of the termination of Citation No. 96191.

M-10, page 3, is a copy of the inspector's statement pertaining to Citation No. 96191.

M-11, page 1, is a copy of Citation No. 97205, July 27, 1978, 30 CFR 55.4-18.

M-11, page 2, is a copy of the termination of Citation No. 97205.

M-11, page 3, is a copy of the inspector's statement pertaining to Citation No. 97205.

M-12, page 1, is a copy of Citation No. 96399, July 18, 1978, 30 CFR 55.20-3.

M-12, page 2, is a copy of the termination of Citation No. 96399.

M-12, page 3, is a copy of a modification of M-12, page 2.

M-12, page 4, is a modification of M-12, page 3.

M-12, page 5, is a copy of the inspector's statement pertaining to Citation No. 96399.

M-13, page 1, is a copy of Citation No. 96159, July 20, 1978, 30 CFR 55.17-1.

M-13, page 2, is a copy of the termination of Citation No. 96159.

M-13, page 3, is a copy of the inspector's statement pertaining to Citation No. 96159.

M-14, page 1, is a copy of Citation No. 96160, July 20, 1978, 30 CFR 55.17-1.

M-14, page 2, is a copy of the termination of Citation No. 96160.

M-14, page 3, is a copy of the inspector's statement pertaining to Citation No. 96160.

2. Freeport introduced the following exhibits into evidence:

O-1 is a drawing of a drum dryer.

O-2 is a letter concerning lock-out procedures established for Freeport's production and shipping department.

O-3 is a photograph.

O-4 is a photograph.

O-5 is an engineering drawing.

O-6 is a photograph.

O-7 is a photograph.

O-8 is a photograph.

O-9 is a booklet entitled "Welding, Cutting & Heating Guide."

O-10 is a gauge.

O-11 is a photograph.

O-12 is a photograph.

O-13 is a photograph.

3. X-1 is a drawing.

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations.

1. Between July 17, 1978, and July 27, 1978, the Respondent, Freeport Kaolin Company, was the operator of a kaolin mine in the State of Georgia known as the Griffin Mine, and with accompanying mills known as the Griffin Mill and the Savannah Mill. In addition, Freeport operates a research lab at the same location (Tr. 4).

2. Between July 17, 1978, and July 27, 1978, Freeport was subject to the provisions of the Federal Mine Safety and Health Act of 1977 with respect to said operations (Tr. 4).

3. Freeport is a large operator. During 1978, the size of said operation was rated at 909,699 man-hours (Tr. 4).

4. There is no evidence of a history of prior violations (Tr. 5).

5. Any penalty that may be assessed may not affect the Respondent's ability to continue in business (Tr. 6).

B. Opinion and Findings of Fact

Between July 18, 1978, and July 27, 1978, MSHA inspector Spencer Lindbeck conducted an inspection of the Freeport Kaolin Company (Tr. 9-10). The subject citations were issued during the course of the inspection (Exhs. M-3, p. 1; M-4, p. 1; M-5, p. 1; M-6, p. 1; M-7, p. 1; M-8, p. 1; M-9, p. 1; M-10, p. 1; M-11, p. 1; M-12, p. 1; M-13, p. 1; M-14, p. 1). The various citations are addressed individually, herein.

I. Docket No. BARB 79-219-PM

Citation No. 96161, July 20, 1978, 30 CFR 55.12-16

Inspector Lindbeck issued Citation No. 96161 on July 20, 1978, citing Freeport for a violation of the mandatory safety standard codified at 30 CFR 55.12-16, when he observed Mr. Ronnie D. Amerson, an employee of Freeport, cleaning the screw conveyor on the No. 8 drum dryer without having the controls locked out (Exh. M-3, p. 1; Tr. 11, 19). The inspector recorded in the body of the citation that Mr. Amerson had the door on the screw conveyor open with his arm inside cleaning clay from the screw (Exh. M-3, p. 1).

The machine in question was a double drum Buffalo Vac atmospheric drum dryer employed to process kaolin by a technique known as thermal evaporation

(Tr. 12-13, 42). Thermal evaporation was accomplished through the use of two rotating cast iron drums, each approximately 3-1/2 feet in diameter and approximately 10 feet in length, heated by steam to a temperature of approximately 300 degrees Fahrenheit (Tr. 42, 45). The sequential steps employed in processing kaolin with the drum dryers is set forth as follows: Clay slurry, or slip, consisting of approximately 55 to 60 percent solid material, is introduced into a pan located beneath the two rotating drums (Tr. 42). Two splash shafts throw clay slurry up onto the underside of the drums (Tr. 21, 42). The heated drums rotate, removing the moisture from the mixture, and eventually reach a point at which a doctor blade, or drum blade, removes the dried product from the drums (Tr. 42). The dry product falls into a trough where the screw conveyor mentioned in the citation is located (Exh. O-1; Tr. 21-22, 42). The door mentioned in the citation was a hinged door, described as a drop-out chute, covering a 12-inch by 16-inch opening in the trough (Tr. 72, 76; Exhs. O-1, O-3, O-4).

Mr. Amerson testified that he had changed the blades on the drum dryer approximately 30 minutes before Inspector Lindbeck arrived (Tr. 28-29), but admitted that he had not locked out the machine while changing the blades (Tr. 30). The machine was not locked out when the inspector arrived and observed Mr. Amerson working on the drum dryer, although the magnetic switch, located approximately 25 feet from where Mr. Amerson was working, was off (Tr. 11, 18, 29, 34, 76-77). The evidence clearly establishes that Mr. Amerson had his hand inside the screw conveyor (Tr. 11, 13, 17, 92), and Freeport's own vice president and general manager testified that under the company's lock-out procedure (Exh. O-2) the machine should have been locked out if a worker had to place his hand inside the screw conveyor (Tr. 69).

Freeport advances two theories contending that 30 CFR 55.12-16 is inapplicable to the facts presented. In its answer to the petition for assessment of civil penalty, Freeport contends that the regulation deals with working on "electrical equipment." Freeport characterizes the equipment involved in the instant proceeding as "mechanical equipment," and not "electrical equipment." Accordingly, Freeport argues, the machine operator was not performing work on any kind of electrical equipment within the meaning of the cited regulation. In its proposed findings of fact and conclusions of law, Freeport argues that 30 CFR 55.14-29 is the regulation applicable to the facts presented. According to Freeport, 30 CFR 55.14-29 permits the machinery to be in motion when such motion is necessary to make adjustments during repair and maintenance. Freeport argues that the evidence convincingly demonstrated that machinery motion was absolutely necessary during maintenance and adjustment of the drum dryer (Respondent's Proposed Findings of Fact and Conclusions of Law, p. 4).

30 CFR 55.12-16, the provision in the Code of Federal Regulations cited by the inspector, provides:

> Mandatory. Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken

> which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

30 CFR 55.14-29, the regulation upon which Freeport relies, provides: "Mandatory. Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments."

I am unable to agree with either theory advanced by Freeport. The purported distinction between "electrical equipment" and "mechanical equipment," as set forth in Freeport's answer to the petition for assessment of civil penalty, does not have a bearing on the issue of whether the cited condition constitutes a violation of 30 CFR 55.12-16. The regulation, insofar as it applies to the facts presented in the instant case, requires the use of lock-out devices or other measures to prevent electrically-powered equipment from being energized without the knowledge of the individuals performing mechanical work on such equipment. The reference is to "electrically-powered equipment" and to "mechanical" work done on it, a reference that fails to support the "electrical/mechanical" distinction advanced by Freeport. The evidence in the record, and the inferences drawn therefrom, establishes that the No. 8 drum dryer was electrically-powered equipment within the meaning of the cited regulation (Tr. 11-12, 13-14, 26, 29-30, 34).

Freeport's reliance on 30 CFR 55.14-29 is misplaced. 3/ The testimony germane to this issue reveals that the drum dryer had to be in operation in order to adjust the blade subsequent to the blade's replacement (Tr. 23-24, 27, 43-45, 56), and that during this operation both the drums and the screw conveyors are in motion (Tr. 42-43). Although the inspector indicated to Mr. Amerson that the machine did not have to be locked out while adjusting the blade (Tr. 29-30, 37), the evidence in the record reveals that a lock-out procedure should have been observed at other stages of the blade-changing operation. According to Mr. Crumbley, the Respondent's manager of

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3/ As relates to the reference to 30 CFR 55.14-29 it should also be pointed out that the Respondent in its own safety lock-out procedure (Exh. O-2) makes reference to 30 CFR 57.12-16 which regulation relates to electrical equipment as does 30 CFR 55.12-16, which is the regulation involved herein. It should also be pointed out that 30 CFR 55.12-16 and 30 CFR 57.12-16 were changed such that the first sentence thereof, on the date of the violation herein, read: "Electrically powered equipment shall be deenergized before mechanical work is done on such equipment" (emphasis added); whereas prior thereto the first sentence read: "Electrical equipment shall be deenergized before work is done on such equipment." The changes were reported in the October 31, 1977, issue of the *Federal Register*. 42 *Fed. Reg.* 57040, 57043 (October 31, 1977).

production and shipping, the machine should have been locked out while the machine operator was changing the blade (Tr. 83), a safety precaution which Mr. Amerson had failed to observe (Tr. 30).

Mr. Amerson and Mr. Bacon testified that rust develops on the drums during the blade-changing procedure, rust that would contaminate the product if permitted to reach the product bin (Tr. 22, 45). Since the clay produced while adjusting the blade contains contaminants, it is necessary that the door on the screw conveyor dropout chute be open while the screw conveyor is running in order to prevent the contaminated material from reaching the product bin (Tr. 22-23, 45). The testimony of Mr. Bacon indicates that the door is somewhat larger than the dropout chute opening. Accordingly, a buildup of clay on the door will prevent obtaining a tight fit when the door is closed (Tr. 45).

Mr. Amerson was not adjusting the blade when the inspector arrived at the No. 8 drum dryer. He was waiting for feed, and the blade adjustment was not completed (Tr. 30). Neither the drum nor the screw conveyor was running at the time (Tr. 30, 32-33, 76). Mr. Amerson testified that he was in the process of cleaning the door on the screw conveyor when the inspector arrived (Tr. 25, 32-33; Exhs. O-1, O-3). He indicated that the next step in the operation would have been to turn on the machine, finish adjusting the blade, and obtain a sample of the material inside the screw conveyor in order to check the moisture (Tr. 34-35). Mr. Amerson indicated that it was not necessary to place his hand inside the screw conveyor since the sample material would simply fall through the opening (Tr. 35-36). The next sequential step would have been to clean and close the door (Tr. 36).

Under the procedure instituted subsequent to the issuance of the citation, the cleaning of the door occurred with the machine locked out (Tr. 38-39). According to Mr. Amerson, this procedure did not produce a satisfactory product (Tr. 39), a statement confirmed by Mr. Bacon's assertion that the screw conveyor must be in operation in order to clean the flap and maintain a good product (Tr. 58).

Although it may be true that machine motion was necessary during certain stages of the blade adjustment process, the evidence establishes that machine motion was not required at the point in time when the inspector observed the violation. As noted above, Mr. Amerson was cleaning the flap and the machine was not in motion. Mr. Bacon confirmed that machine motion was not necessary for the performance of these activities (Tr. 64-65). At one point in his testimony, Mr. Bacon indicated that shutting down the machine in order to close the dropout chute door would permit the heated drums to expand sufficiently to ride against the blade holders (Tr. 57-58). However, he indicated that this problem would not occur with neither the drum nor the conveyor turning and no product being processed (Tr. 61).

Assuming for purposes of argument that 30 CFR 55.14-29 applies to the facts presented, the above-noted considerations reveal that the machine should have been locked out both while changing the blade and while the machine operator was engaged in the door-cleaning activities observed by the inspector. Machine motion was not necessary for the performance of these steps.

Accordingly, I conclude that a violation of 30 CFR 55.12-16 has been established by a preponderance of the evidence in that the No. 8 drum dryer was not locked out while the operator was performing mechanical work on the machine.

Negligence of the Operator

Exhibit O-1, dated May 31, 1977, mandates a lock-out procedure for the No. 8 drum dryer. The existence of this document establishes not only that Freeport was aware of the importance of locking out electrically-operated equipment prior to performing work on the equipment, but also that Freeport was aware of this for more than 1 year prior to the issuance of the citation.

The evidence in the record indicates that the company's lock-out procedure had not been effectively communicated to the employees. Inspector Lindbeck testified that when the violation was observed, he querried Mr. Amerson as to the lock-out procedure. Not only did Mr. Amerson have no idea of what the lock-out procedures were, but Mr. Scandlyn, the maintenance superintendent, and Mr. Wharton, the supervisor of safety and health, had to show Mr. Amerson how to use the lock-out device after one had been obtained (Tr. 12). The inspector's testimony was confirmed by Mr. Amerson, who testified that he was not told that he was required to lock out the machine while changing the blades until the day the citation was issued (Tr. 30-31). In fact, Mr. Crumbley opined that it was unnecessary to use a lock-out and that Mr. Amerson was following the normal procedure for the piece of equipment involved (Tr. 77). Mr. Bacon testified that the failure to lock out the machine was a common practice, stating that no danger was involved since the workman would be accustomed to working near moving parts (Tr. 62-63).

Although Mr. Bacon stated that the lock-out procedure was posted on the bulletin boards and was covered with the section foremen and the section superintendents (Tr. 46), he could not state affirmatively that each employee received a copy (Tr. 63). He testified that the foremen were supposed to distribute them, but noted that the company did not have them signed and that no meeting was held (Tr. 63). Although Mr. Amerson had seen a copy of the letter, he testified that he was left to interpret it on his own (Tr. 104-105).

In light of these considerations, I conclude that Freeport demonstrated gross negligence.

Gravity of the Violation

As noted previously, Mr. Amerson's hand was inside the screw conveyor (Tr. 11, 13, 17, 92). Although the screw conveyor was not in operation at the time (Tr. 33, 76), the evidence establishes that Mr. Amerson was exposed to a danger of serious injury or death. Inspector Lindbeck testified that a man could lose his life or an arm in the screw conveyor in the event the machine was started inadvertently (Tr. 13-15). Mr. Bacon conceded that an individual would sustain an injury to the portion of his body inside the screw conveyor if the machine was turned on (Tr. 49). The evidence clearly showed that the screw conveyor would be in motion if the machine started. Even under Mr. Crumbley's definition of "dangerous," Mr. Amerson was in a hazardous situation. According to Mr. Crumbley, "dangerous" means "near moving parts" (Tr. 81). In such cases, the machine should be locked out (Tr. 81).

Accordingly, I conclude that the violation was extremely serious.

Good Faith in Attempting Rapid Abatement

Abatement was achieved by providing a lock-out device, and abatement was completed in approximately 5 minutes (Exh. M-3, p. 1; Tr. 14-15). Accordingly, In conclude that Freeport demonstrated good faith in attempting rapid abatement.

II. Docket No. BARB 79-280-PM

Citation No. 96162, July 20, 1978, 30 CFR 55.14-26

Inspector Lindbeck issued Citation No. 96162 citing the following condition as a violation of 30 CFR 55.14-26: "The glass coverings are broken on the oxygen and acetylene guages [sic] on the service truck at the selas building" (Exh. M-5, p. 1; Tr. 113).

The evidence reveals that two gauges were present on the oxygen cylinder and two gauges were present on the acetylene cylinder. One gauge on each cylinder was a high pressure gauge, monitoring the pressure inside the cylinder (Tr. 288). These high pressure gauges indicate the contents of the cylinders (Tr. 305). The remaining gauge on each cylinder was a low pressure gauge used to indicate the pressure on the hose and torch (Tr. 305).

At the time of the inspection, the glass was broken out and missing from the high and low pressure gauges on both the oxygen and acetylene cylinders (Tr. 301). Inspector Lindbeck testified that the indicator needle was bent on one of the gauges on the oxygen cylinder. He believed that the bent needle was on the low pressure gauge (Tr. 301). He did not recall the condition of the needles on the acetylene tank gauges (Tr. 301-302).

The regulation in question, 30 CFR 55.14-26, is a mandatory safety standard which provides: "Unsafe equipment or machinery shall be removed from service immediately." The question presented is whether MSHA has established a violation of the regulation by a preponderance of the evidence. 29 CFR 2700.48 (1978) (interim procedural rules). For the reasons set forth below, I answer this question in the negative.

In order to establish a violation of 30 CFR 55.14-26, MSHA must affirmatively establish that the welding equipment was unsafe and that it had not been removed from service immediately.

The threshold question is whether MSHA has established that the welding equipment was unsafe. In this regard, it is important to bear in mind that the low pressure gauges and the high pressure gauges perform different functions, as set forth above, and that each type of gauge presents separate considerations from the standpoint of safety.

Inspector Lindbeck, at one point in his testimony, indicated that the absence of the glass coverings and the presence of the bent indicator needle rendered the gauges defective in that their absence interfered with the operator's ability to obtain accurate pressure readings (Tr. 118-119, 128-130, 132-133). The testimony of Inspector Lindbeck further reveals his opinion that the inability to obtain accurate pressure readings renders the welding equipment unsafe by presenting an explosion hazard (Tr. 137). According to Inspector Lindbeck, if the welding equipment operator is obtaining a different pressure than the one indicated by the gauges, an explosion can occur when the welder lights the cutting torch (Tr. 138).

Both Inspector Lindbeck and Inspector Mattson indicated that safe welding procedure envisions the welder adjusting this oxygen/acetylene mixture with reference to the pressure gauges, a procedure that requires him to stand near the regulator (Tr. 139, 262-263, 284-290). The photograph on page 22 of Exhibit O-9 reveals that the regulator is attached to the tank. According to Mr. Scandlyn, the regulator, not the gauge, is what controls the flow of gas from the tank (Tr. 197). According to Inspector Mattson, a welder adjusts his pressure for both oxygen and acetylene by monitoring the gauges while turning the valve controls on the respective regulators (Tr. 284-290).

Inspector Mattson associated two safety hazards with the defective gauges. First, it was his position that too much pressure in the lines running from the oxygen tank and the acetylene tank to the torch can cause a hose to rupture since the hoses are designed to withstand pressures less than the maximum pressure that can pass through the regulator (Tr. 287-290). Second, improperly functioning gauges induce welders to take shortcuts having an adverse effect on safety. According to Inspector Mattson, a welder should "back up" the regulator by turning it counterclockwise upon completion of his welding to prevent a sudden burst of pressure from rupturing the diaphragm when the tank valve is subsequently opened (Tr. 262-263, 270-271, 290-295). The absence of properly-functioning gauges induces workers not to "back up" the regulators. The inspector stated that rupturing the diaphragm can result in an explosion occurring at the gauge (Tr. 290-291).

Mr. James V. Turner, an individual with 26 years of experience in welding (Tr. 303) and the president of the Welding Supply and Service Company, Inc., the supplier of Freeport's welding equipment, testified on behalf of Freeport. His description of the equipment and its functioning is germane to the issue of safety raised in the instant proceeding. According to

Mr. Turner, the regulator has a safety device that opens and vents the gases should the pressure exceed permissible levels inside the regulator (Tr. 309, 339). This venting system exists to prevent explosions (Tr. 340). The type of regulators used by Freeport are 175 pounds. The hoses are 300 psi test hoses. Accordingly, the regulator will not build up sufficient pressure to burst the hose (Tr. 309, 311). The safety valve is designed to activate if a sudden burst of pressure enters the regulator (Tr. 309-310). According to Mr. Turner, the regulator will not pass enough pressure to ignite the acetylene because 175 pounds is the maximum pressure that the adjusting screw will allow to enter the oxygen hose (Tr. 326). It is recommended that acetylene not be used at a pressure exceeding 15 pounds (Tr. 326). A gauge is not needed to prevent the equipment operator from exceeding 15 pounds because the spring inside the acetylene regulator prevents exceeding this pressure (Tr. 326-327). No evidence was presented establishing that the spring was defective.

Mr. Turner conceded that if the diaphgram ruptured, the 2,200 pounds of pressure in the tank could escape through the regulator, notwithstanding the fact that the regulator is rated at 175 pounds. However, he indicated that this gas would escape through the vents, not the hoses, and further indicated that an explosion hazard was not present (Tr. 340-341).

I am unable to conclude that a preponderance of the evidence establishes that the gauges in question were unsafe. The testimony addressing the possibility of rupturing one of the hoses clearly refers to the low pressure gauge, since that type of gauge monitored the pressure in the hoses.

As relates to rupturing the diaphgram, the crucial consideration is the failure of a welder to "back up" the regulator upon completion of his welding operations, not the proper functioning of the pressure gauge per se. I am not persuaded that an accurate reading from this gauge is necessary from a safety standpoint. As noted by Inspector Mattson, the gas released from the pressure tanks into the regulator will "shoot fast" irrespective of how slowly the tank valve is opened (Tr. 294-295).

MSHA's witnesses sought to establish that a properly functioning low pressure gauge is necessary to avoid rupturing a hose at a given point in the welding operation. The Government has failed to show that the absence of the glass on both guages and the bent needle on the oxygen tank gauge rendered the low pressure gauges unsafe per se. The most persuasive testimony by the Respondent's well qualified expert totally rebutted MSHA's claim that the condition was unsafe.

His experience and knowledge was much greater than that of MSHA's witnesses. Much greater weight must be accorded his opinions as to the safety issue.

In light of these consideration, it cannot be found that a violation of 30 CFR 55.14-26 has been established by a preponderance of the evidence.

Citation No. 96173, July 25, 1978, 30 CFR 55.14-1

This citation was issued because covers were not provided on the screw conveyor at the spray dryer bagging building (Exh. M-4, p. 1; Tr. 140). The missing cover was approximately 6 feet long and 14 inches in width (Tr. 141), and was lying on the floor beside the screw conveyor (Tr. 143). The screw conveyor was open at the time (Tr. 141). Although none of the witnesses affirmatively stated that the screw conveyor was in operation, the fact that the inspection party heard an air leak emanating from the back of the machine renders it more probable than not that it was in operation (Tr. 143).

Mr. Scandlyn agreed that the cover was, in fact, off the conveyor (Tr. 206). His testimony further reveals that the "floor" mentioned by the inspector was a maintenance walkway or maintenance platform 12 to 15 feet above the ground (Tr. 202-203; Exh. O-5). Access to the platform was provided by a ladder located inside the building and by a stairway located outside the building (Tr. 211). Although it was not a normal operating area in the sense that an employee would not go there to perform a routine function such as bagging clay (Tr. 202), employees would be in the area in the event of a breakdown or to perform some other maintenance function (Tr. 202). A man's arm could be tangled up in the open screw conveyor (Tr. 142).

The mandatory safety standard embodied in 30 CFR 55.14-1 states that: "Gears; sprockets; chains; * * * and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

The location of the screw conveyor, coupled with the fact that employees would be in the area to perform maintenance work on occasion, indicates that the exposed moving screw conveyor should have been covered. Accordingly, I conclude that a violation of 30 CFR 55.14-1 has been established by a preponderance of the evidence.

Negligence of the Operator

Mr. Scandlyn believed that a malfunction in the vent indicator, or bin indicator, in the bagging bin caused the clay to pile up in the screw conveyor and force the cover off (Tr. 203-204, 208). A bin indicator is a device used to measure the flow into a particular bin, cutting off a line when the bin is full (Tr. 206).

Mr. Scandlyn testified that he remembered "a report of a problem with the bin indicator at the beginning of the shift," *i.e.*, at approximately 8 a.m. (Tr. 206-207). The citation in question was issued at approximately 10 a.m. (Tr. 203; Exh. M-4, p. 1).

According to Mr. Scandlyn, once it has been discovered that the bin indicator is not working, the normal procedure is to request the electrical foreman to check it and to discover and correct the problem (Tr. 207). It is routine to check the entire line to determine whether the malfunction of the bin indicator could have caused flow problems down the line, an inspection encompassing the subject screw conveyor (Tr. 207). However, Mr. Scandlyn could not state that it had been checked (Tr. 207-208).

Based on the foregoing, I conclude that if this routine practice had been followed, it is more probable than not that Freeport knew or should have known of the condition. The 2-hour time period between 8 and 10 a.m. afforded sufficient time to discover the problem.

Accordingly, I conclude that Freeport demonstrated ordinary negligence.

Gravity of the Violation

Inspector Lindbeck testified that one employee was in the area when the violation was observed (Tr. 141-142). Mr. Scandlyn indicated uncertainty as to the identity of this employee. He believed that a foreman had been summoned to the area, and thought that the foreman had been the employee (Tr. 204). A maintenance man would pass by the area. Accordingly, I conclude that one employee would be exposed to the hazard.

A man could have been injured by getting his arm tangled in the machinery or by getting his clothing caught in it (Tr. 142). Although the inspector testified that an occurrence could prove fatal (Tr. 142), I believe the statement contained in the inspector's statement (Exh. M-4, p. 3), which was made closer in time to the actual occurrence, to be more probative. It indicates that the contemplated injury could reasonably be expected to be permanently disabling, and that an occurrence was probable.

Accordingly, I conclude that the violation was serious.

Good Faith in Attempting Rapid Abatement

The violation was abated by Mr. Scandlyn. He picked up the cover lying on the floor and placed it on the screw conveyor (Tr. 142). Accordingly, I conclude that Freeport demonstrated good faith in attempting rapid abatement.

Citation No. 96174, July 25, 1978, 30 CFR 55.12-30

This citation was issued when the inspector observed that: "The conduit is broken loose at the damper valve at the No. 2 dryer" (Exh. M-6, p. 1). According to Mr. Scandlyn, the conduit is not a rigid pipe, but a spiral-wound rubber or plastic-coated conduit providing a flexible connection (Tr. 220). Inspector Lindbeck indicated that the conduit was composed of metal (Tr. 146). The break was caused by deterioration of the conduit (Tr. 220).

The inspector testified that he did not notice any break in the wiring's insulation (Tr. 150). Mr. Scandlyn testified that the power conductor was visible, but that it was still insulated (Tr. 220). The inspector was uncertain of the precise voltage, but testified that it was either 110 or 120 volts (Tr. 147). The power conductor was energized (Tr. 156).

According to the inspector, vibration could cause the insulation to rub against the conduit and wear through, thus posing an electrocution hazard (Tr. 147, 154-155).

The question presented is whether this condition constitutes a violation of 30 CFR 55.12-30, which provides: "Mandatory. When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized." (Emphasis added.) Although the condition was potentially dangerous, this fact, standing alone, is insufficient to establish a violation of the mandatory safety standard. I interpret the regulation as requiring MSHA to prove knowledge of the condition before a violation can be found to have occurred, as demonstrated by the regulation's use of the word "found." In essence, the regulation proscribes the knowing use of electrical equipment or wiring once a potentially dangerous condition is discovered. There is no indication in the record that Freeport had knowledge of this condition prior to the issuance of the citation.

Accordingly, I conclude that a violation has not been established by a preponderance of the evidence.

Citation No. 96179, July 26, 1978, 30 CFR 55.12-34

This citation was issued when Inspector Lindbeck observed that: "There are several lights along the upper walkway that are not provided with guards" (Exh. M-7, p. 1). The inspector did not recall the number of unguarded lights (Tr. 157). The walkway in question, located at the Savannah Plant (Exh. M-7, p. 1), was above the bin storage area (Tr. 157) and served as an accessway for maintenance personnel and operators (Tr. 222). The inspector did not recall the dimensions of the walkway in terms of width and height, but opined that the height was less than 6 feet in some places because he and Mr. Scandlyn "had to bend over to walk through it." Mr. Bacon testified that all of the lights are probably within striking distance of a person wearing a hardhat (Tr. 157; Exh. O-7; Tr. 227). The testimony of Inspector Lindbeck and Mr. Bacon establish the existence of a shock or burn hazard (Tr. 158, 229).

30 CFR 55.12-34, the cited mandatory safety standard, provides that: "Portable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded." It is clear that the bulbs in the walkway area were located in such a manner as to present a shock or burn hazard. They should have been guarded in order to comply with the regulation's requirements. The fact that the evidence failed to establish the precise number of unguarded bulbs does not prevent finding a violation. One unguarded bulb would have been sufficient for this purpose.

Accordingly, I conclude that a violation of 30 CFR 55.12-34 has been established by a preponderance of the evidence.

Negligence of the Operator

Mr. Bacon testified that company practice, in recent years, had been to provide guards for lights located in "normal walkways" (Tr. 224). The fact that Mr. Bacon did not deem the cited area a "normal walkway" (Tr. 223) is not controlling. He stated that it is used by maintenance personnel and operators of equipment (Tr. 222). The fact that the company practice of providing guards existed indicates that the company was aware of the need to provide guards in areas open to access by its employees. Accordingly, I conclude that Freeport demonstrated a high degree of ordinary negligence.

Gravity of the Violation

One employee was observed in the area, and he was wearing a hardhat (Tr. 158, 160). The inspector testified that an employee could sustain an electric shock causing a fall and could be exposed to an electrocution hazard as a result of breaking a bulb (Tr. 158). The fact that the walkway was less than 6 feet in some places would aggravate the hazard (Tr. 157). The area was dry (Tr. 161). Additionally, the testimony of Mr. Bacon indicates that a burn hazard was present and that employees carried metal parts for screw conveyors through the area (Tr. 229-230).

Although the inspector's testimony implies that an occurrence could prove fatal, the entry contained in the inspector's statement indicates that the contemplated injury could reasonably be expected to be lost workdays or restricted duty (Exh. M-7, p. 3). I am inclined to accord greater probative value to the entry in the inspector's statement since it was made at a point in time closer to the observation of the condition than was his testimony.

An occurrence was classified as "probable" (Tr. 158; Exh. M-7, p. 3).

Based on the foregoing, I conclude that the violation was moderately serious.

Good Faith in Attempting Rapid Abatement

The inspector's testimony implies that the violation was abated expeditiously (Tr. 159). Accordingly, I conclude that Freeport demonstrated good faith in attempting rapid abatement.

Citation No. 96181, July 26, 1978, 30 CFR 55.14-6 4/

This citation was issued when Inspector Lindbeck observed a loose guard over the metal saw's drive belts (Exh. M-8, p. 1; Tr. 161). The saw

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4/ The citation was written alleging a violation of 30 CFR 55.14-1. However, during the course of the hearing, the Judge granted MSHA's motion to amend the petition for assessment of civil penalty as relates to Citation No. 96181 to charge a violation of 30 CFR 55.14-6 instead of 30 CFR 55.14-1.

in question was located in the auto repair shop (Tr. 161-162). The best available evidence indicates that the piece of equipment in question was a continuous motorized hacksaw used for cutting steel pipes and steel bars (Exh. O-8; Tr. 232, 235-236). Mr. Scandlyn's testimony confirms the presence of the loose guard (Tr. 249). Although the equipment was not in operation when the inspector observed the loose guard (Tr. 347), his testimony reveals that it is more probable than not that an employee was using the equipment immediately prior to the issuance of the citation (Tr. 162, 166, 352).

30 CFR 55.14-6, the applicable mandatory safety standard, provides that: "[e]xcept when testing the machinery, guards shall be securely in place while machinery is being operated." No evidence was presented by Freeport rebutting the inspector's testimony that the equipment was in operation immediately prior to the issuance of the citation, and no evidence was presented by Freeport indicating that the employee in question was merely testing the equipment.

Accordingly, in view of the foregoing, I conclude that a violation of 30 CFR 55.14-6 has been established by a preponderance of the evidence.

Negligence of the Operator

The maintenance supervisor was present in the shop when the inspector arrived on the scene (Tr. 162), but the inspector admitted that he did not know whether the supervisor knew of the condition (Tr. 166). The record contains no evidence indicating how long the condition had existed (*see, e.g.*, Tr. 162).

The fact that a supervisory employee was present in the shop indicates that Freeport should have known of the violation. Freeport demonstrated ordinary negligence in connection with the violation.

Gravity of the Violation

The area was a normal work area (Tr. 163). The hazard posed by the violation was that the guard could make contact with the drive belts causing them to break and strike an employee (Exh. M-8, p. 3). The inspector classified the probability of occurrence as "slightly remote" (Tr. 163). One employee was exposed to the hazard (Exh. M-8, p. 3).

Accordingly, I conclude that moderate gravity was associated with the violation.

Good Faith in Attemtping Rapid Abatement

The condition was corrected immediately (Tr. 236). In fact, the condition was corrected while the inspector was present (Tr. 166). Accordingly, I conclude that Freeport demonstrated good faith in attempting rapid abatement.

III. Docket No. BARB 79-281-PM

Citation No. 96191, July 26, 1978, 30 CFR 55.14-1

This citation was issued when the inspector observed a guard missing from the end shaft on the No. 4 calciner (Tr. 358; Exh. M-10, p. 1). The testimony of Mr. Scandlyn reveals that the cited piece of equipment was located on a bin discharge drive located under a bin which supplies the feed for the No. 4 calciner. He testified that the drive shaft connection was approximately 3 inches in diameter. The variable speed drive shaft rotated at 10 to 20 revolutions per minute (Tr. 400). The unguarded portion of the shaft was approximately 3 to 4 inches in length (Tr. 400). A keyway was present on the end of the shaft. A keyway is a slot in the shaft for the placement of a key (Tr. 402). The inspector testified that the end of the shaft was burred, and that the shaft was in operation when he observed the condition (Tr. 362).

According to Mr. Scandlyn, maintenance employees could perform maintenance work near the shaft (Tr. 407-408). The testimony of both Inspector Lindbeck and Mr. Scandlyn establishes that the condition presented a possibility of injury to employees (Tr. 359, 361, 402-403).

30 CFR 55.14-1 provides: "Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

Based on the foregoing testimony of Inspector Lindbeck and Mr. Scandlyn, I conclude that a violation of 30 CFR 55.14-1 has been established by a preponderance of the evidence.

Negligence of the Operator

The inspector testified that the operator should have known of the condition because it was in a frequently-traveled area (Tr. 359). The inspector's assertion that supervisors travel in the area daily (Tr. 361) was never rebutted by Freeport's witnesses. However, there is no evidence in the record indicating how long the condition had existed. Without such evidence, it is impossible to determine that the condition had existed long enough for one of Freeport's supervisory personnel to have observed it.

Accordingly, I conclude that operator negligence has not been established by a preponderance of the evidence.

Gravity of the Violation

A cleanup or maintenance man working in the area could be near the exposed shaft (Tr. 361, 407-408). According to the inspector, burrs or a keyway on the end of the shaft could get a man's clothing entangled in the shaft (Tr. 359). As noted previously in this decision, the shaft possessed both characteristics. I therefore conclude that an occurrence was probable.

Mr. Scandlyn described the potential harm as ranging from a torn pair of pants to a small scratch or cut, but not a deep laceration (Tr. 402-403). Based on the fact that the shaft rotated at a low rate of speed, I find his testimony on this point credible.

Based on the foregoing, I conclude that the violation was accompanied by moderate gravity.

Good Faith in Attempting Rapid Abatement

Mr. Scandlyn testified that the guard was replaced immediately (Tr. 402). Although the inspector believed that the condition was abated on July 27, 1978, the day after the issuance of the citation, he nevertheless testified that the operator attempted rapid compliance after notification of the condition (Tr. 360). Accordingly, I conclude that Freeport demonstrated good faith in attempting rapid compliance.

Citation No. 97205, July 27, 1978, 30 CFR 55.4-18

The citation alleges, in pertinent part, that oxygen was being stored in an area where grease, paint and oils were stored (Exh. M-11, p. 1). The testimony reveals that the "oxygen" in question consisted of a fully-charged oxygen cylinder on an oxyten-acetylene welding set located in part of the pilot plant (Tr. 363-364, 409).

According to Mr. Scandlyn, the pilot plant building was probably 60 feet in width, 100 to 150 feet in length and approximately 25 to 30 feet in height (Tr. 408). According to the inspector, the building was basically a large open room which he described as an operating area (Tr. 367).

Two areas screened off by wire mesh, and each measuring approximately 10 feet by approximately 15 to 20 feet, were located inside the building (Tr. 409). According to Mr. Scandlyn, the first wire cage area was a workshop area. He testified that it "has power tools, drill presses, I believe a band saw, and tools of various nature, a work table, a sorting iron, this type of thing, what we call a lazy susan for part storage approximately four feet in diameter with several rotating shelves on it" (Tr. 409). Mr. Scandlyn confirmed that an oxygen-acetylene tank set mounted on a hand truck was in the area on July 27, 1978 (Tr. 409). Mr. Scandlyn classified the area as a "normal work place," and would not classify the area as a storeroom (Tr. 410).

The inspector, however, classified the area as a storage area containing tools, paint, grease, oil, and solvent, in addition to the oxygen cylinder (Tr. 363). The inspector testified that at least a dozen cans of paint and oil were present (Tr. 363-364).

Mandatory safety standard 30 CFR 55.4-18 states that "[o]xygen cylinders shall not be stored in rooms or areas used or designated for oil or grease storage." The question presented is whether the evidence establishes "storage" within the meaning of the regulation. At the outset, it cannot be found that the paint observed by the inspector was "oil" within the meaning of the regulation. Such a finding would have to be based on probative evidence establishing the presence of oil-based paint in the subject area of the pilot plant building. The record contains no evidence establishing this fact. Accordingly, only the grease and oil observed by the inspector are germane to a resolution of the issues presented.

I am inclined to accept the inspector's characterization that the oxygen was at the time in question being "stored" with the oil and grease cans due to the dimensions of the wire mesh area, and the volume and types of materials observed there and the fact that it was locked. This conclusion is bolstered by inferences drawn from the testimony of Mr. Scandlyn, which indicate that the time the oxygen would be in the cage area between uses could be days; and therefore the area was used as a "short-term" storage area (Tr. 414-415).

Accordingly, I conclude that a violation of 30 CFR 55.4-18 has been established by a preponderance of the evidence.

Negligence of the Operator

Regular supervision was attached to this area of the plant and the condition was in plain view (Tr. 364). Inferences drawn from the testimony of Mr. Scandlyn (Tr. 411-412) indicate that it is more probable than not that the condition had existed for an appreciable period of time prior to July 27, 1978. However, considering the fact that the area was used periodically as a workshop, and the other surrounding circumstances, it cannot be found that Freeport demonstrated gross negligence.

Accordingly, I conclude that Freeport demonstrated ordinary negligence.

Gravity of the Violation

An occurrence was probable (Exh. M-11, p. 3; Tr. 364). The resulting injury could reasonably be expected to produce lost workdays or restricted duty (Exh. M-11, p. 3). The record contains no evidence relating to the number of employees exposed to the hazard.

Accordingly, I conclude that moderate gravity was associated with the violation.

Good Faith in Attempting Rapid Abatement

Abatement was accomplished by expeditiously moving the combustibles to another area (Tr. 365; Exh. M-11, p. 2). Accordingly, I conclude that Freeport demonstrated good faith in attempting rapid compliance.

IV. Docket No. BARB 79-282-PM

Citation No. 96399, July 18, 1978, 30 CFR 55.20-3

This citation was issued when Inspector Lindbeck observed "several holes in [the] walkway on top of storage tank I-T-17 that need to be covered" (Exh. M-12, p. 1). The subject walkway was constructed of expanded metal (Tr. 371). The cited holes were three or four in number (Tr. 372). Estimates as to the size of the holes varied. Inspector Lindbeck estimated that the holes were approximately 6 inches by 8 inches or 8 inches by 8 inches (Tr. 372), while Mr. Scandlyn's estimate was "4 to 6 inches * * * to about 6 to 8 inches" (Tr. 421, 426). However, it is significant to note that Mr. Scandlyn believed, as a general proposition, that holes over 4 inches "probably should be covered" (Tr. 422).

Mr. Scandlyn testified that the walkway in question was located above a holding tank (Tr. 419). The platform was reached by a spiral stairway (Tr. 424). The tank was approximately 32 feet in height and 37 feet in diameter and was used to hold a mixture consisting of clay and water (Tr. 419, 426). He further testified that an agitator gearbox and grind motor was located atop the tank which operated a large shaft extending toward the bottom of the tank. A rake arm on the shaft prevents mixed material from "settling out and becoming semi-solid in the bottom of the tank" (Tr. 419-420).

Mr. Scandlyn testified that the holes had been cut in the walkway around the "periphery of the base of the agitator gear box" to provide access to a support chain used to stabilize the agitator shaft (Tr. 420, 429). The testimony of Mr. Wharton indicates that the walkway was 3 to 4 feet wide (Tr. 430-431).

Mandatory safety standard 30 CFR 55.20-3 provides, in part, as follows: "Mandatory. At all mining operations: * * * (c) Every floor, working place, and passageway shall be kept free from protruding nails, splinters, holes, or loose boards, as practicable." It is undisputed that the holes existed in the subject walkway. Furthermore, the evidence establishes that it was practicable to keep the walkway free of holes. There is no indication that the holes performed any function essential to the daily operation of the agitator mechanism, outside of providing periodic access to the support chain. This conclusion is confirmed by the testimony of Mr. Scandlyn, wherein he expressed his belief that the employees had permitted the platform to remain in the condition observed by the inspector "because they knew they would be back there someday to do that same job over, and they would need that same access" (Tr. 424-425). Furthermore, the steps taken to abate the condition, infra, reinforce the view that it was practicable to keep the walkway free of holes.

Accordingly, it is found that a violation of 30 CFR 55.20-3 has been established by a preponderance of the evidence.

Negligence of the Operator

Two employees were observed performing maintenance functions on the walkway, but the inspector's testimony reveals that those employees were not engaged in alleviating the violation (Tr. 371-372, 374). The inspector did not know how long the holes had been present in the walkway (Tr. 373, 376). He testified, however, that Mr. Scandlyn and a foreman indicated that either a motor or its base had been replaced and that the resulting hole had not been covered (Tr. 379), a statement which differs radically from Mr. Scandlyn's previously-mentioned testimony wherein he indicated that the holes had been made to provide access to the agitator shaft stabilizing chain. Having been afforded the opportunity to assess the credibility of the witness, I conclude that Mr. Scandlyn's testimony accurately reflects the circumstances surrounding the cutting of the subject holes.

It can be inferred from Mr. Scandlyn's testimony that the condition not only existed for a long period of time but also would have been permitted to exist for a period of several months or several years into the future (Tr. 425). Furthermore, Mr. Scandlyn stated that holes greater than 4 inches should be covered and even acknowledged the presence of a tripping hazard (Tr. 422).

In view of these considerations, I conclude that Freeport demonstrated gross negligence.

Gravity of the Violation

Two maintenance employees were present on the walkway when the inspector arrived (Tr. 371). Additionally, an employee visited the area daily to check the tank level (Tr. 423-424).

The inspector indicated that a man's foot could enter one of the holes and he could either suffer a broken leg or stumble and fall into a storage tank (Tr. 373; Exh. M-12, p. 5). However, I conclude that the presence of the handrail around the outside of the walkway (Exhs. O-13, X-1) would render improbable falling into the storage tank. Considering the size of the holes, the dimensions of the walkway, and the extent of employee exposure, I conclude that a broken leg hazard existed. An occurrence was probable. An occurrence could reasonably be expected to result in lost workdays or restricted duty (Exh. M-12, p. 5).

Accordingly, I conclude that the violation was moderately serious.

Good Faith in Attempting Rapid Abatement

The condition was abated immediately by covering the holes with steel plates (Tr. 373). Accordingly, I conclude that Freeport demonstrated good faith in attempting rapid compliance.

Citation No. 96159, July 20, 1978, 30 CFR 55.17-1

On July 20, 1978, Inspector Lindbeck conducted a night inspection at Freeport's Griffin Mill facility (Exh. M-13, p. 1; Tr. 380). The subject citation was issued, citing Freeport for a violation of 30 CFR 55.17-1 as follows: "The lighting in the warehouse area does not illuminate all areas - 6 large overhead lights are not working" (Exh. M-13, p. 1).

The condition was observed in the warehouse storage area (Tr. 380). The building was approximately 100 feet in length and approximately 50 feet in width (Tr. 380). The lights were approximately 20 to 25 feet above the floor (Tr. 436). According to Mr. Scandlyn, they were basically 300-Watt incandescent lamps with reflectors (Tr. 436).

Six lights were unlit out of a total of approximately 20 lights (Tr. 380-381, 435-436). Four were in the vicinity of the inspection party and two were toward the other end of the building (Tr. 436). Approximately five or six employees were working in the area. At least one forklift was operating in the area (Tr. 380).

Mandatory safety standard 30 CFR 55.17-1 provides that: "[i]llumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas." The question presented is whether a preponderance of the evidence establishes that the illumination in the cited area was inadequate to provide safe working conditions. The record clearly reflects that the inspector's opinion as to inadequate lighting was based solely on his visual observation (Tr. 385-386). The inspector testified that he cited the condition because he was unable to see all employees working in the work area, and indicated that he was unable to see individuals approximately 30 to 40 feet away (Tr. 388-389). He further testified that shadows in the area prevented forklift operators from seeing the men (Tr. 381). This testimony is contradicted by the tenor of Mr. Scandlyn's testimony wherein he indicated that he was fairly certain that he was able to see a good 50 feet and distinguish color (Tr. 433).

Freeport argues that the regulation in question "is unduly and unenforceably vague in that there are no objective criteria or parameters of illumination by which an operator can reasonably be expected to measure its levels of illumination for purposes of compliance" (Respondent's Proposed Findings of Fact, Conclusions of Law, p. 21; see also Respondent's Brief in Support of Proposed Findings of Fact and Conclusions of Law, p. 3). I am unable to agree with Freeport's contention. It may be desirable as a matter of policy to promulgate a regulation specifying with particularity the level of illumination necessary to provide safe working conditions. But simply because such action is desirable from a policy standpoint does not mean that the existing regulation is unenforceably vague as a matter of law. Whether a given level of illumination is sufficient to provide safe working conditions presents a question of fact, and there is no indication in the record that such factual issue cannot be resolved by presentation of evidence of some recognized scientific test with an objective standard as to adequate lighting in the work place. An objective standard is necessary to prevent enforcement actions initiated solely on the basis of an inspector's subjective evaluation. It should be pointed out that certain occasions will arise where the evidence will establish inadequate lighting even absent reference to an objective standard. But this will be limited to cases where reasonable minds cannot be expected to differ as to the adequacy of the lighting, such as cases involving a complete absence of lighting or cases where other evidence clearly establishes an inadequacy of illumination.

In the instant case MSHA has failed to present enough objective evidence to sustain its burden of proof as to the warehouse area in general. The inspector's testimony that he was unable to see individuals at a distance of approximately 30 to 40 feet was rebutted by Mr. Scandlyn's assertion that he could distinguish color at approximately 50 feet. In addition, the fact that approximately 14 lights with 300-Watt incandescent bulbs and reflectors were present and alight in and of itself implies adequate illumination.

However, MSHA has sustained its burden of proof as to one specific area of the warehouse. The inspector, at one point in his testimony, indicated that Mr. Bruce Dial, the MSHA trainee who accompanied the inspector, stepped onto the edge of a large hole in the floor due to the inadequate lighting (Tr. 389-392). Since it was established that the inspector could not see the hole and the circumstances almost lead to an accident, it is considered that this is the kind of evidence which clearly establishes inadequate illumination at that one location.

Accordingly, I conclude that a violation of 30 CFR 55.17-1 has been established by a preponderance of the evidence.

Negligence of the Operator

The fact that six lights were not operating in the warehouse and the lack of sufficient lighting near a refuse hole in the warehouse should have been known to the supervisors for the Respondent.

Accordingly, the Respondent has demonstrated ordinary negligence.

Gravity of the Violation

The potential hazard in the specific situation is a fall leading to a possible broken leg or lesser injury. Accordingly, I conclude that the violation was moderately serious.

Rapid Abatement

The violation was abated the next day. Therefore, I conclude that Freeport demonstrated good faith in attempting rapid abatement.

Citation No. 96160, July 20, 1978, 30 CFR 55.17-1

This citation was issued by Inspector Lindbeck during his July 20, 1978, night inspection at the Griffin Mill (Tr. 393; Exh. M-14, p.1). The citation states that "there is not sufficient illumination at rail load out area (tank car). Lights were not in working order at time of inspection." The condition allegedly constitutes a violation of 30 CFR 55.17-1.

As noted previously in this decision, 30 CFR 55.17-1 mandates that illumination sufficient to provide safe working conditions be provided on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas. Although the citation, as incorporated into the petition for assessment of civil penalty, appears to be confined to an allegation that the illumination was insufficient only in a loading area, the testimony of the inspector sought to characterize the area not only as a loading area but also as a walkway (Tr. 394). However, certain statements contained in the inspector's statement (Exh. M-14, p. 3) reveal that Inspector Lindbeck cited the area solely on the basis of its use as a load-out area. Under the heading of "Gravity," the inspector wrote that "poor lighting in the area could cause a slip or fall from either cars or loading platform." Accordingly, I conclude that the allegation in the petition is confined to the use of the area as a rail load-out area.

The testimony of both Inspector Lindbeck and Mr. Scandlyn reveals that no employees were working in the cited area at the time of the inspection (Tr. 393, 437-438). According to the inspector, bulk loading of the railroad cars occurs in the area at night (Tr. 393-394). However, he admitted that he did not see either tank car movement nor switching activities that night (Tr. 396). Additionally, Mr. Scandlyn testified that no cars were being loaded in the area on the night in question (Tr. 437).

Since the record reveals that work was not being performed in the rail load-out area at the time, I conclude that a violation of 30 CFR 55.17-1 has not been established by a preponderance of the evidence.

Even assuming for purposes of argument that the petition can be construed to allege a violation of 30 CFR 55.17-1 based on insufficient illumination in a walkway, or that this issue has been tried with the implied consent of the parties, I conclude that the evidence fails to establish a violation. First, the deficiences in evidence of some scientific test with an objective standard, noted previously in this decision, presents a substantial obstacle to the finding of a violation. Logically, the objective standards should be set forth in the regulation. Second, the evidence reveals that residual lighting from surrounding buildings provided enough illumination to permit a man to walk through the area without the use of a flashlight (Tr. 397, 438, 440, 443-444). Accordingly, I am unable to conclude that a preponderance of the evidence establishes that the illumination in the cited area was insufficient to permit its safe use as a walkway.

VI. History of Previous Violations

The parties stipulated that no evidence exists to establish a history of prior violations (Tr. 5).

VII. Size of the Operator's Business

The parties stipulated that Freeport is a large operator. During 1978, the size of the operator was rated at 909,699 man-hours (Tr. 4).

VIII. Effect on the Operator's Ability to Continue in Business

The parties stipulated that any penalty that may be assessed may not affect Freeport's ability to continue in business (Tr. 6).

Furthermore, the Interior Board of Mine Operations Appeals has held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). Therefore, I find that penalties otherwise properly assessed in these proceedings will not impair the operator's ability to continue in business.

IX. Conclusions of Law

A. Freeport Kaolin Company and its Griffin and Savannah Mills have been subject to the provisions of the 1977 Mine Act at all times pertinent to this proceeding.

B. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, these proceedings.

C. MSHA inspector Spencer Lindbeck was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the citations which are the subject matter of these proceedings.

D. The ruling in Docket No. BARB 79-280-PM granting MSHA's motion to amend the petition for assessment of civil penalty as relates to Citation No. 96181 to allege a violation of 30 CFR 55.14-6 instead of 30 CFR 55.14-1 is affirmed.

E. The ruling in Docket No. BARB 79-280-PM granting MSHA's motion to withdraw the petition for assessment of civil penalty as relates to Citation No. 96184, July 26, 1978, 30 CFR 55.12-30 is affirmed.

F. The violations described in the following citations are found to have occurred as alleged:

(1) Docket No. BARB 79-219-PM (Citation No. 96161, July 20, 1978, 30 CFR 55.12-16);

(2) Docket No. BARB 79-280-PM (Citation Nos. 96173, July 25, 1978, 30 CFR 55.14-1; 96179; July 26, 1978, 30 CFR 55.12-34; 96181, July 26, 1978, 30 CFR 55.14-6);

(3) Docket No. BARB 79-281-PM (Citation Nos. 96191, July 26, 1978, 30 CFR 55.14-1; 97204; July 27, 1978, 30 CFR 55.4-18);

(4) Docket No. BARB 79-282-PM (Citation No. 96399, July 18, 1978, 30 CFR 55.20-3; No. 96159, July 20, 1978, 30 CFR 55.17-1).

G. MSHA has failed to prove the violations charged as relates to the following citations:

(1) Docket No. BARB 79-280-PM (Citation Nos. 96162, July 20, 1978, 30 CFR 55.14-26; 96174, July 25, 1978, 30 CFR 55.12-30);

(2) Docket No. BARB 79-282-PM (Citation No. 96160, July 20, 1978, 30 CFR 55.17-1)

H. All of the conclusions of law set forth in Part V, *supra*, are reaffirmed and incorporated herein.

X. Proposed Findings of Fact and Conclusions of Law

Freeport and MSHA submitted posthearing briefs. Neither party submitted reply briefs. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in these cases.

XI. Penalties Assessed

Upon consideration of the entire record in these cases and the foregoing findings of fact and conclusions of law, I find that the assessment of penalties is warranted as follows:

Docket No. BARB 79-219-PM

Citation No.	Date	30 CFR Standard	Penalty
96161	July 20, 1978	55.12-16	$255

Docket No. BARB 79-280-PM

Citation No.	Date	30 CFR Standard	Penalty
96173	July 25, 1978	55.14-1	$ 60
96179	July 26, 1978	55.12-34	50
96181	July 26, 1978	55.14-6	40

Docket No. BARB 79-281-PM

Citation No.	Date	30 CFR Standard	Penalty
96191	July 26, 1978	55.14-1	$ 40
97205	July 27, 1978	55.4-18	75

Docket No. BARB 79-282-PM

Citation No.	Date	30 CFR Standard		Penalty
96399	July 18, 1978	55.20-3		$ 75
96159	July 20, 1978	55.17-1		40
			Total	$635

XII. Approval of Settlement

During the hearing on June 22, 1979, the representatives of the parties informed the undersigned Administrative Law Judge that a settlement had been negotiated as relates to eight of the 13 citations at issue in Docket Nos. BARB 79-281-PM and BARB 79-282-PM. It was further stated that a motion requesting approval of settlement would be filed at a later date (Tr. 344-346). On October 22, 1979, the parties filed a joint motion to approve settlement and dismiss addressing the eight above-noted citations.

Information as to the six statutory criteria contained in section 110 of the 1977 Mine Act has been submitted. This information has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

The alleged violations and the settlements are identified as follows:

Docket No. BARB 79-281-PM

Citation No.	Date	30 CFR Standard	Assessment	Settlement
96194	July 26, 1978	55.12-30	$ 38	$ 38
96200	July 26, 1978	55.14-8(b)	60	60
97202	July 27, 1978	55.12-34	48	48
		Totals	$146	$146

Docket No. BARB 79-282-PM

Citation No.	Date	30 CFR Standard	Assessment	Settlement
96145	July 18, 1978	55.11-2	$ 24	$ 24
96149	July 18, 1978	55.14-1	48	48
96398	July 18, 1978	55.20-3	34	34
96156	July 19, 1978	55.14-1	66	66
96158	July 19, 1978	55.14-1	48	48
		Totals	$220	$220

The parties set forth the following reasons in support of the proposed settlements:

> After a review of all available evidence, the parties hereby agree that the settlement set out in this motion would be proper because:
>
> 1. There is no reduction in the proposed assessment.
>
> 2. The respondent has paid the $366.00, which is the proposed assessment and such payment will have no effect on its ability to remain in business.
>
> 3. Respondent is a large operator.
>
> 4. The violations were moderately serious.
>
> 5. Respondent demonstrated good faith by attempting to achieve required compliance after notification of the alleged violation. Respondent represents that the conditions cited were immediately abated.
>
> 6. Respondent has no history of previous violations at this mine.
>
> 7. Respondent withdraws its request for a hearing.
>
> It is the parties belief and conviction that approval of this settlement is in the public interest and will further the intent and purpose of the Federal Mine Safety and Health Act of 1977.

The reasons given above by the representatives of the parties for the proposed settlement have been reviewed in conjunction with the information submitted as to the six statutory criteria contained in section 110 of the Act. After according this information due consideration, it has been found to support the proposed settlement. It therefore appears that a disposition approving the settlement will adequately protect the public interest.

XIII. Order

A. The ruling in Docket No. BARB 79-280-PM granting MSHA's motion to amend the petition for assessment of civil penalty as relates to Citation No. 96181 to allege a violation of 30 CFR 55.14-6 instead of 30 CFR 55.14-1 is AFFIRMED.

B. The ruling in Docket No. BARB 79-280-PM granting MSHA's motion to withdraw the petition for assessment of civil penalty as relates to Citation No. 96184, July 26, 1978, 30 CFR 55.12-30 is AFFIRMED.

C. The settlement outlined in Part XII of this decision is herewith APPROVED. Since Freeport has paid the agreed-upon settlement figure of $336, IT IS ORDERED that the petitions for assessment of civil penalty be, and hereby are, DISMISSED as they relate to the citations encompassed by the settlement.

D. IT IS FURTHER ORDERED that the citations set forth in Part IX(G) of this decision be, and hereby are, VACATED and the various petitions for assessment of civil penalty be, and hereby are, DISMISSED as they relate to those citations.

E. IT IS FURTHER ORDERED that Freeport pay civil penalties in the amount of $635 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

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Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
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JAN 31 1980

LOCAL UNION NO. 6843, DISTRICT 28,	:	Complaint for Compensation
UNITED MINE WORKERS OF AMERICA,	:	
Applicants	:	Docket No. VA 80-17-C
v.	:	
	:	Amonate No. 31 Mine
WILLIAMSON SHAFT CONTRACTING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.C., for Applicants;
Timothy J. Parsons, Esq., Loomis, Owen, Fellman & Howe, Washington, D.C., for Respondent.

Before: Judge Charles C. Moore, Jr.

Applicants United Mine Workers filed a complaint for compensation under section 111 of the Act (Federal Mine Safety and Health Act of 1977), based upon events which transpired during a roof control inspection conducted by MSHA inspector Carl E. Boone on August 9, 1979, at Consolidation Coal Company's Amonate No. 31 Mine.

The facts not in issue show that Inspector Boone conducted a roof control inspection of "the main headings being turned off the ventilation shaft" (Complaint, para. III). The shaft and headings in question were being constructed by Respondent Williamson Shaft Contracting Company pursuant to a contract with Consolidation Coal Company. After this, the facts are disputed.

In a report filed by Inspector Boone with his supervisor, [1] the inspector states that upon inspecting the roof bolt installation near the bottom of the shaft in question he found that the majority of the roof bolts installed against the coal roof had less torque than that required by Consolidation Coal Company's approved roof control plan. This allegation is denied by Respondent.

---

[1] Attached to Applicants' Statement in Opposition to Respondent's Motion to Dismiss as Exhibit A (sent under separate cover). I do not consider this report to be determinative of the facts but treat it as relevant evidence. Any denials by Respondent as to the contents of the inspector's report are duly noted, *infra*.

Inspector Boone wrote that "the company" was also checking the roof bolts and makes further reference to "management." It is unclear whether he is referring to the management of Consolidation Coal Company or to William Shaft Contracting Company but for the purposes of this decision I will assume he means Consolidation Coal Company. The report further states that when management asked for Inspector Boone's recommendations concerning the roof bolts, he informed them that they could either rebolt the area using mechanical bolts with adequate anchorage or use resin rods. The company decided to use resin rods, to be installed within 1 or 2 days after the proper materials were ordered and delivered. At this point, Inspector Boone told the company that the only work that they should do in the area would be to install one of the roof support methods he had recommended in order to comply with safety precaution No. 12(c) of their approved roof control plan. As a result of this recommendation, several miners were idled during the day and afternoon shifts on August 9, 1979.

Section 111 of the Act (30 U.S.C. § 821) entitles miners to compensation at varying rates for the time they are idled when a mine or a portion of a mine is closed pursuant to an order issued under sections 103, 104 or 107 of the Act (30 U.S.C. §§ 813, 814 and 817, respectively). Applicants claim that Inspector Boone's recommendation amounted to a verbal withdrawal order under sectin 107(a) of the Act (Complaint, para. IX). That section reads as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

Thus, an inspector may issue withdrawal orders under this section where he or she determines that an imminent danger exists. However, subsection (d) of section 107 specifically requires such orders to be in writing. 2/

2/ Section 107(d) provides as follows:
"Each finding made and order issued under this section shall be given promptly to the operator of the coal or other mine to which it pertains

Construing the facts in a light most favorable to the Applicants, 3/ there is no evidence in this case of a specific verbal finding of imminent danger by the inspector, nor of a written finding of imminent danger nor, as both parties concede, of a written withdrawal order pursuant to section 107.

Applicants point out that Inspector Boone's statement had the same effect as a withdrawal order by causing a temporary cessation of mining activities. Applicants then use a "but for" test to create a causal nexus between the Inspector's statement and their claims for compensation. Assuming that Inspector Boone's statement did cause a cessation of mining activities, idling some miners, it is necessary to determine whether section 111 or any other section of the Act anticipates an award of compensation in such a case.

As to other than imminent danger orders, subsections (a) through (f) of section 103 of the Act authorize the Secretary to inspect mines, investigate accidents, require operators to maintain records, and provide for a representative of the miners to accompany inspectors during inspections. Section (g) provides for miner-initiated inspections upon a written notice to the Secretary alleging a violation of the Act or an imminent danger. These inspections may be conducted independently or may be incorporated into a regular inspection by the Secretary. There is no evidence in this case that the inspection which took place was initiated by a miner or by a representative of the miners.

Subsections (h) through (j) of section 103 provide for the maintenance of certain records, prescribe a minimum number of inspections of mines containing explosive gases and set forth the Secretary's powers in the event of an accident. Subsection (k) authorizes the Secretary to issue appropriate orders in accident situations. The alleged order in this case was not connected to an accident in the mine.

Section 104(b) authorizes the Secretary to issue orders where an operator has failed to abate a violation for which he was cited within the time allowed and the Secretary determines that the abatement time should not be extended. There is no evidence of a prior citation in this case. Section 104(d) allows withdrawal orders to issue in two cases. In the

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fn. 2 (continued)
by the person making such finding or order, and all of such findings and orders shall be in writing, and shall be signed by the person making them. Any order issued pursuant to subsection (a) may be modified or terminated by an authorized representative of the Secretary. Any order issued under subsection (a) or (b) shall remain in effect until vacated, modified, or terminated by the Secretary, or modified or vacated by the Commission pursuant to subsection (e), or by the courts pursuant to section 106(a)." (Emphasis added.)

3/ As required by Federal Rules of Civil Procedure Rule 56, 28 U.S.C.A. (note 124), advisory for purposes of Commission decisions.

first case, the Secretary must issue a withdrawal order under section 104(d)(1) where an operator violates, unwarrantably, any mandatory health and safety standard within 90 days of the issuance of an unwarrantable failure citation. In the second case, an order must promptly issue under section 104(d)(2) where the Secretary, upon subsequent inspection, finds violations similar to those in the original unwarrantable failure citation and no interim inspection has verified abatement of the original violations. Again, there is no evidence of a citation in this case so that the alleged order could not have been issued pursuant to section 104(d). Section 104(e) allows the Secretary to issue withdrawal orders where it finds that an operator has a pattern of violating mandatory health or safety standards. There is no evidence of such a pattern in this case. Section 104(f) allows the Secretary to issue withdrawal orders where it finds that the atmosphere of a mine contains an excessive amount of respirable dust. There is no evidence that the order alleged here was such an order.

The statutory scheme outlined above anticipates that withdrawal orders would be issued subsequent to the issuance of a citation where the operator either has not abated the condition described in the citation or the condition has recurred, except in the case of imminent danger orders which may be issued without reference to particular health and safety standards. While sections 103 and 104 of the Act do not specifically require orders issued thereunder to be in writing, there are other references in the Act to publishing orders and making them available for public inspection which assumes that the orders would be in writing. Although section 107 is the only section which specifically requires orders to be in writing, it appears that all orders under the 1977 Act are expected in all cases to be in writing. The legislative history is in accord.

Section 111 of the 1977 Act entitling miners to compensation for idle time was taken directly from its counterpart in the Federal Coal Mine Health and Safety Act of 1969 ("1969 Act"): section 110(a). (See Legislative History of the Federal Mine Safety and Health Act of 1977 at 1337.) Section 110(a) of the 1969 Act entitled a miner to compensation for time lost when a mine was closed by an order issued under section 104 of the 1969 Act. Section 104 in turn described the various withdrawal orders the Secretary could have issued upon finding violations of the Act and imminent dangers and required, inter alia, in subsection (f) that "all such notices and orders shall be in writing." Thus, the requirement of a writing is clearly stated under the 1969 Act.

Applicant further offers the case of Alabama By-Products Corporation v. Mining Enforcement and Safety Administration and United Mine Workers of America, BARB 76-153, 76-220 and 76-221 (August 19, 1976), in support of its position that a verbal recommendation can constitute an order of withdrawal. It should be noted that the administrative law judge in that case was considering a written citation and specifically confined his decision to the facts presented (at 19).

Based upon the foregoing, the only type of withdrawal order the inspector could have issued would have been for imminent danger and he clearly did not do that.

ORDER

Respondent's motion to dismiss is hereby GRANTED.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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JAN 31 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. LAKE 79-24 A.O. No. 33-01173-03036
v.	:	Meigs No. 2 Mine
SOUTHERN OHIO COAL COMPANY, Respondent	:	

DECISION AND ORDER

In response to the order to show cause of December 6, 1979, the Secretary has filed a motion for summary disposition and the operator a response that is in effect a cross-motion for summary disposition or to dismiss based on the legal defense raised in its pretrial submission of September 17, 1979. Oral argument on the motions was heard on January 17, 1980. The operator claims its defense challenging the validity of Citations Nos. 278700, 278801 and 278802, 1/ is timely and may be raised under sections 105(a) and (d) of the Act, 30 U.S.C. 815(a), (d), Rule 22 of the Commission's Rules of Procedure, and the Commission's decision in Energy Fuels Corporation, DENV 78-410, 1 BNA MSHC 2013, 2020, 1 FMSHRC Decisions 299, 315 (May 1, 1979) (dissenting opinion of Commissioner Lawson).

I agree that as interpreted by the Commission in Energy Fuels, the Act permits an operator to challenge the validity of an abated citation either within thirty days of its issuance or

---

1/ The other two citations involved in this proceeding are subject of a motion to approve settlement filed November 29, 1979.

thirty days after receipt of a notice of proposed penalty assessment. 2/ On the other hand, the Commission has held the validity of closure orders must be challenged immediately or not at all. Pontiki Coal Corp., PIKE 78-420-P, 1 BNA MSHC 2208, CCH 1979 OSHD ¶23,979, 1 FMSHRC Decisions 1476 (October 25, 1979); Wolf Creek Collieries, PIKE 78-70-P, FMSHRC 79-3-11 (March 26, 1979). This anomaly results from the fact that the Commission has interpreted section 105(a) of the Act as permitting a challenge to the issuance (validity) of a section 104(a) citation after receipt of a notice of proposed penalty assessment. Energy Fuels, supra; Rule 22. For the reasons set forth in Commissioner Lawson's dissenting opinion in Energy Fuels, I believe the Commission should reconsider and eliminate this anomaly in the review procedure. Compare Beckley Coal Mining Co., HOPE 79-35, et al, (November 27, 1978).

Assuming therefore, without deciding, that a challenge to the issuance of a citation includes a challenge to its validity on the ground that the inspection giving rise to its issuance was unauthorized, 3/ I will proceed to consider the operator's motion on its merits. 4/

2/ The challenge to validity was not filed until September 17, 1979. This was much longer than thirty days after receipt of the notice of proposed penalty assessment. The Rules, however, do not provide at what stage of a civil penalty proceeding a challenge to validity other than a general denial must be filed. Compare Rule 22 with Rule 28. In view of the uncertainty in the Commission's statement of its procedures, I will assume for the purpose of this disposition that the challenge was timely.

3/ Since an ultra vires inspection does not result in automatic application of the exclusionary rule, the fact that an inspection is found to be unauthorized may not retroactively invalidate the use of the citation as the predicate for a valid penalty proceeding. See Savina Home Industries v. Secretary, 594 F.2d 1358, 1361-1365 (10th Cir. 1979); Todd Shipyards Corp. v. Secretary, 586 F.2d 683, 690 (9th Cir. 1978). As noted in the text infra, the inspector here acted pursuant to clear congressional authorization. It is obvious, therefore, that enforcement of the instant citations will not contravene the imperative of judicial integrity that calls for application of the exclusionary rule. See, United States v. Peltier, 422 U.S. 531, 536 (1975).

4/ For purposes of disposing of the operator's motion, I have assumed that the inspection and citations were the result of a request for special inspection made under section 103(g)(1) of the Act, 30 U.S.C. 813(g)(1). Transcript p. 14.

The undisputed facts show that during a closeout conference following a regular inspection of the Meigs No. 2 Mine on December 21, 1978, Inspector Petit received an oral request from a representative of the miners to examine the areas referred to in the challenged citations. (Wilson Deposition at 34). As a result of the inspector's observations, three citations issued charging the operator with failure to comply with its approved roof control plan and the mandatory safety standard set forth in 30 CFR 75.200. The conditions cited were promptly abated and thereafter the Secretary proposed a penalty of $325.00 for each citation.

Section 103(g)(1) of the Mine Act, 30 U.S.C. 813(g)(1), provides that at the written request of a miner or representative of miners who has reasonable grounds to believe that an imminent danger or a violation of the Act or a mandatory standard exists MSHA shall perform an immediate special inspection to determine the existence of the complained of condition or practice, except that if the complaint indicates an imminent danger the operator shall be notified "forthwith" so that action can be taken to abate the condition or withdraw the miners even before the inspection. 5/ 30 CFR Part 43 (1978); Legislative History, Mine Safety and Health Act of 1977, 95th Cong., 2d Sess. at 1324 (July 1978). Section 103(g)(1) further provides that a copy of the notice given MSHA by the miner or his representative "shall be provided the operator or his agent no later that at the time of the inspection." Id.

5/ Section 103(g)(1), 30 U.S.C. 813(g)(1) provides:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

Respondent claims the failure of the inspector to furnish this copy to its agent at the time of the inspection requires a finding that the inspection was unauthorized and that citations issued as a result are null and void. I do not agree.

Sections 103(g)(1) and (2) 6/ originated as sections 104(f)(1) and (2) of the Senate Bill, S. 717. Leg. Hist., supra, at 531-532. With reference to the requirement for furnishing a copy of the miner's written notice to the operator, the Senate Report states:

> While Section 104(f)(1) requires that such complaints be written, and signed by the complaining party, the Committee does not intend to preclude the Secretary's response to unwritten or unsigned complaints. The Committee notes that MESA currently maintains an inward WATS line (an "800" number) for the express purpose of receiving complaints about hazardous conditions in the mines. The Secretary must respond to appropriate complaints under section 104(f)(1), but need not necessarily follow up on complaints that do not meet the requirements of that section. Leg. Hist., supra, at 617. 7/

It appears therefore that while an inspector is not required he is authorized to make a special spot inspection "to determine if such violation or danger exists in accordance with the provisions of" Title 1 of the Act.

6/ Section 103(g)(2), 30 U.S.C. 813(g)(2) provides:

> Prior to or during any inspection of a coal or other mine, any representative of miners or a miner in the case of a coal or other mine where there is no such representative, may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act or of any imminent danger which he has reason to believe exists in such mine. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation or order with respect to such danger and shall furnish the representative of miners or miner requesting such review a written statement of the reasons for the Secretary's final disposition of the case.

7/ Resort to legislative history may be had even where the statutory language seems clear and unambiguous because "while the clear meaning of statutory language is not to be ignored, 'words are inexact tools at best' . . . and hence it is essential that we place the words of a statute in their proper context by resort to legislative history." Tidewater Oil Co. v. United States, 409 U.S. 151, 157 (1972).

This construction is consonant with section 103(g)(2) which does not require that a copy of the request for inspection be furnished the operator where the request is made prior to or during an inspection. While the failure of the miner to reduce his request for inspection to writing may justify a refusal by the inspector to make either a (g)(1) or (g)(2) inspection, it does not render the inspection performed an illegal or unauthorized search or furnish any ground for complaint by the operator of a violation of any procedural or substantive rights conferred by the Act.

Reference to the Conference Report, S. Rep. 95-461, 95th Cong., 1st Sess., at 46, Leg. Hist., supra, at 1324, shows that the purpose of the requirement that the "request for an inspection be served on the mine operator no later than the commencement of the inspection" was "to protect [the complaining] miners from possible retribution" by the operator. This echoes the statement by the Senate Committee that "the Committee is aware of the need to protect miners against possible discrimination because they file complaints. . ." Leg. Hist., supra, at 617.

Finally, with respect to the requirement that MSHA notify an operator or his agent "forthwith" if the complaint indicates an imminent danger, 8/ the Conference Report states:

> The failure of the Secretary to notify the operator or his agent under this provision will not nullify any citation or order that may be issued as the result of the inspection in response to the request under this section, even if such inspection discloses the existence of an imminent danger situation in the mine. Leg. Hist., supra, at 1324.

The corollary of this is that the inspector's failure to give a copy of the written notice to the operator at the time of the inspection does not invalidate any citation issued under section 103(g) because (1) an operator is not entitled to advance notice of a compliance inspection; (2) the purpose of furnishing a copy of the miner's complaint is for the miner's

---

8/ Supra, note 5.

protection not the operator's; (3) the inspector is authorized to make the inspection even where the request is oral; and (4) there is no requirement for furnishing a copy of the notice where the request for inspection is made prior to or during the course of a regular inspection. Leg. Hist., supra, at 617, 1324; 30 CFR part 43.

What was fashioned by Congress as a shield against retaliation should not by an exercise in literalism be converted into a sword of nullification.

I conclude therefore that the purpose of furnishing a copy of the miner's complaint to the operator is to put the operator on notice that the complainant was engaged in a protected activity in filing the complaint. The operator acts then at his peril if he retaliates because the copy of the notice lays the foundation for a finding of willful and knowing violation of the anti-discrimination provisions of the Act. Section 105(c)(1), 30 U.S.C. 815(c)(1). Such a violation may be subject to the civil and criminal sanctions of sections 110(c) and (d), 30 U.S.C. 820(c), (d).

For these reasons, I find the failure to furnish a copy of a request for a special inspection does not invalidate the inspection or nullify the citations issued as a result of the inspection. It is ORDERED therefore that the operator's motion for summary disposition or to dismiss be, and hereby is, DENIED.

Following oral argument on the motions, counsel for both parties moved that in the event respondent's legal defense was overruled settlement of the three violations involved be approved at the amount originally assessed for each violation, $325.00. The remaining two violations charged are subject of a motion for approval of settlement in the amount of $160.00 each filed November 29, 1979. For the reasons set forth in the parties' submissions and based on an independent evaluation and de novo review of the circumstances, I find the proposed settlement in accord with the purposes and policy of the Act.

Accordingly, it is FURTHER ORDERED that the motions to approve settlement be, and hereby are, GRANTED, and that the operator pay the penalty agreed upon, $1295.00, on or before Wednesday, February 20, 1980, and that subject to payment the captioned petition be DISMISSED.

Joseph B. Kennedy

Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY
AND
HEALTH REVIEW COMMISSION

FEBRUARY 1980
Volume 2
No. 2

DECISIONS

J.Y.

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FEBRUARY

The following cases were Directed for Review during the month of February:

Secretary of Labor , MSHA v. Paramont Mining Company, VA 79-51; (Judge Broderick, December 31, 1979.)

Republic Steel Corporation v. Secretary of Labor, MSHA, PENN 80-56-R, PENN 80-61-R (Judge Kennedy, January 3, 1980.)

Review was Denied in the following cases during the month of February:

Secretary of Labor, MSHA v. Ottawa Silica Company, WILK 79-69-PM; (Judge Michels, December 28, 1979)

Secretary of Labor, MSHA on behalf of Anthony Heriges, etc., v. Island Creek Coal Company, KENT 80-22-D, etc. (Judge Bernstein, January 24, 1980)

Secretary of Labor, MSHA v. Arch Mineral Corporation, WEST 79-58; Petition for Interlocutory Review.

Thomas Dickenson & John Turner v. Clinchfield Coal Company, VA 79-93-D; Petition for Interlocutory Review.

Alan Lund v. Clinchfield Coal Company, VA 79-94-D; Petition for Interlocutory Review.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

February 7, 1980

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

v. : Docket No. WEST 79-58

ARCH MINERAL CORPORATION

ORDER

Arch Mineral Corporation's petition for interlocutory review of an order of the administrative law judge that granted the Secretary of Labor's Motion to Accept Late Filing of Proposal for Penalty is denied. We do not pass on the question of what circumstances, if any, may excuse the late filing of a Proposal for Penalty. Because the events in this case occurred during the period of transition between the Commission's interim and final procedural rules, issues concerning the interpretation of final Commission Rule 27(a) are not presented squarely by this petition for interlocutory review. Our denial of the petition is not to be construed in any way as approval of the failure by the Secretary to timely file a proposal for a penalty in this or any other case.

Richard V. Backley, Commissioner

A. E. Lawson, Commissioner

Marian Pearlman Nease, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

February 25, 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

ISLAND CREEK COAL COMPANY

Docket No. KENT 79-129

DECISION

On October 6, 1978, an inspector of the Mine Safety and Health Administration inspected Island Creek Coal Company's Big Creek No. 2 mine. He observed an alleged violation of 30 CFR §75.400 (accumulation of combustible materials), which he believed was caused by an unwarrantable failure of the operator to comply with that standard. As a result of his finding, the inspector issued a withdrawal order under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §814(d)(1), because he believed that a citation containing the findings that must precede a section 104(d)(1) withdrawal order had been issued on September 27, 1978. 1/

1/ Section 104(d)(1) provides:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

On August 21, 1979, the Secretary filed with the Commission a proposal for a penalty, seeking the assessment of a penalty under section 110 of the Act for the alleged violation of 30 CFR §75.400 cited in the October 6 withdrawal order. A penalty of $2,000 was sought.

Thereafter, the Secretary discovered that the September 27, 1978 citation had been modified by the inspector on September 28, 1978 to provide that "[t]he 104 D-1 citation and termination is hereby modified to a 104-A citation and termination." 2/ Thus, a citation containing the prerequisite findings did not in fact precede the October 6 withdrawal order under section 104(d)(1). On November 21, 1979, the Secretary filed a motion to dismiss the instant penalty proceeding, on the ground that "[a]s a result of the modification of [the September 27 citation, the October 6 order] is without foundation and does not properly allege a violation of section 104(d)(1) of the Act." On November 29, 1979, without explanation, the administrative law judge granted the Secretary's motion to dismiss. On December 28, 1979, we directed review on our own motion to determine whether the judge erred in granting the Secretary's motion to dismiss. We reverse.

The Secretary's motion, and the judge's dismissal, proceeded on an erroneous understanding of the Act's penalty provisions. Section 110(a) of the Act provides in part:

> The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation.

The Act mandates assessment of a penalty for any violation of a mandatory safety standard, such as 30 CFR §75.400, whether that violation is alleged in a citation issued under section 104(a), or in a withdrawal order issued under section 104(d) or other section of the Act. Whether a withdrawal order was properly issued or not (rather than a citation alone) does not affect the fact that a violation of a mandatory safety standard was alleged in that order. That allegation, unless itself properly vacated, survives a vacation of the order it is contained in, and, if proven, the assessment of a penalty under section 110 is required. Thus, whether the October 6, 1978 withdrawal order was properly issued under section 104(d)(1) is not relevant to the assessment of a penalty under section 110 for an alleged violation of a safety standard cited in that order. Therefore, the judge erred in granting the motion to dismiss.

2/ Presumably, the inspector meant that he was modifying the September 27 citation to delete either or both of the "significant and substantial" or "unwarrantable failure" findings in that citation.

Accordingly, the judge's order of dismissal is reversed and the case is remanded for further proceedings.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

February 25, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 79-127
VAN MULVEHILL COAL CO., INC.	:	

DECISION

On January 22, 1979, an inspector of the Mine Safety and Health Administration inspected Van Mulvehill Coal Company's Black Creek No. 1 mine. He observed several alleged violations of mandatory safety standards, and he believed that an imminent danger existed. He issued a combined citation and withdrawal order under sections 104(a) and 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§814(a) and 817(a). The document stated:

> An imminent danger existed in that the mine fan was not operating and employees were in the mine (75.300). A ventilation and dust control plan had not been submitted (75.316). A fan stoppage plan had not been submitted (75.321). An up-to-date map of the mine had not been submitted to MSHA (75.316-1a). The operator had not submitted arrangements for emergency medical assistance (75.1713-1(a)(b)). [Citation and Order No. 239804.]

The conditions cited by the inspector were abated by the operator and the withdrawal order was terminated on January 30, 1979.

On October 12, 1979, the Secretary filed with the Commission a proposal for a penalty, seeking the assessment of penalties under section 110 of the Act for the five alleged violations cited on January 22, 1979. Penalties totaling $164 were sought.

On November 28, 1979, the inspector issued a document that stated:

> Citation number 239804 issued January 22, 1979 is vacated on grounds that coal was not being produced at the time. The financial condition as stated by accountants are such that the payment of the penalties could have an effect on the company continuing in operation. There has been full cooperation since the issuance of the citation to comply with the Act and regulations by company officials and employees.

On December 10, the Secretary moved to withdraw his proposal for a penalty "for the reason that the Order of Withdrawal No. 239804, heretofore issued, has been vacated." On December 12, the administrative law judge granted the motion. On January 11, 1980, we directed review on our own motion to determine whether the judge erred in granting the Secretary's motion to dismiss. We reverse.

We do not have before us in this civil penalty proceeding the propriety of the imminent danger withdrawal order issued under section 107(a). Thus, to the extent that the inspector's action on November 28, 1979, vacated that order (presumably on the basis that no imminent danger existed), as implied by the Secretary's December 10 motion to dismiss, we do not decide whether or not the vacation was correct. Even if it was, however, dismissal of the civil penalty proceeding was error. The Act mandates assessment of a penalty for any violation of a mandatory safety standard or any provision of the Act, whether that violation is alleged in a citation issued under section 104(a), or in a withdrawal order.... Whether a withdrawal order was properly issued or not (rather than a citation alone) does not affect the fact that a violation was alleged in that order. That allegation, unless itself properly vacated, survives a vacation of the order it is contained in, and, if proven, the assessment of a penalty under section 110 is required. Cf. Island Creek Coal Company, Docket No. KENT 79-129 (February , 1980). Thus, whether the January 22, 1979, withdrawal order was properly issued under section 107(a) is not relevant to the assessment of a penalty under section 110 for alleged violations cited in that order.

To the extent, however, that the inspector's November 28 action purported to vacate the section 104(a) citations, as appears was his intent, the dismissal was still error. As the Secretary now correctly states in his brief on review, the factors stated by the inspector do not support vacation of the citations. Rather, if the alleged violations occurred, those factors may be taken into account in considering the criteria of gravity, effect on ability to continue in business, and good faith of abatement efforts in assessing appropriate penalties under section 110(i) of the Act.

Accordingly, the judge's order of dismissal is reversed and the case is remanded for further proceedings.

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson

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Marian Pearlman Nease

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Administrative Law Judge Decisions

February 1 - 29, 1980

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 4 1980

WHITE PINE COPPER,
DIVISION OF COPPER MINE,
Applicant

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent

: Applications for Review
:
: Docket No. LAKE 79-223-RM
: Citation No. 295881; 7/31/79
:
: Docket No. LAKE 79-224-RM
: Citation No. 294054; 7/31/79
:
: Docket No. LAKE 79-225-RM
: Citation No. 295055; 7/31/79
:
: Docket No. LAKE 79-226-RM
: Citation No. 294056; 8/1/79
:
: White Pine Mine

DECISION AND ORDER

The Secretary moves to dismiss the captioned matters on the ground that vacation of the challenged citations moots the issue of their validity. The operator opposes the motion on the ground that issuance of the citations was in excess of MSHA's statutory authority. The operator seeks therefore an order declaring MSHA's action null, void and unenforceable. See, Eastern Associated Coal Corp., HOPE 73-663, decided February 12, 1974, affirmed in part and reversed in part, 4 IBMA 298 (1975); Eastern Assoc. Coal Corp. v. IBMA, 491 F.2d 277 (4th Cir. 1974); Super Tire Engineering v. McCorkle, 416 U.S. 115, 122-126 (1975).

In essence, the operator claims that MSHA's method of enforcement is a deprivation of its property without due process of law. MSHA and the Union, on the other hand, claim that the operator's asserted right to change its ground support system without proof that the alternate method is safe may result in deprivation of a miner's right to life, liberty and property, also without due process of law.

The record shows that acting on a complaint under section 103(g)(1) of the Act, MSHA charged that the operator's failure to furnish data substantiating its claim that use of 4-foot resin bolts in lieu of alternating 4 and 6-foot mechanical bolts was a violation of the ground support standard for metal mines. 30 CFR 57.3-20. Thereafter, an evaluation of the alternate method by MSHA and the operator established that in any area of the mine where "geologic and stress conditions are similar" 4-foot resin bolts will provide minimal adequate support. Evaluation Report at 6. In areas where the "geologic and horizontal stress conditions are different", however, MSHA reserves the right to require the operator to prove the efficacy of the 4-foot resin bolts prior to their general use.

After a careful consideration of the vital interests involved, I conclude the interest in life outweighs the interest in property. Congress made this choice inevitable when, in staking out goals for the Mine Safety Act, it solemnly declared that "the first priority and concern of all in the mining industry must be the health and safety of its most precious resource--the miner". That priority is reflected in the Act's review provisions, which do not tolerate temporary relief from 104(a) citations but which, under the Commission's decision in Energy Fuels Corp., DENV 78-410, 1 BNA MSHC 2013, 1 FMSHRC Decisions 299, (May 1, 1979), do provide for immediate, expedited review of the merits of abated citations. For these reasons, I find the operator's claim of irreparable injury or deprivation of property without due process of law without merit. As the courts have noted, "irreparable harm, presupposes the absence of an available remedy for relief, whether administrative or judicial." Sink v. Morton, 529 F.2d 601, 604 (4th Cir. 1975). In this case the Act clearly provides such a remedy since the operator can obtain an expedited hearing on the merits of the validity of a citation or closure order, including the right to apply for a temporary stay of a closure order. Such a procedure accords the operator all the process he is due. Lucas v. Morton, 358 F.Supp. 900, 905 (W.D. Pa. 1972); Sink v. Morton, supra.

The premises considered, it is ORDERED that the Secretary's motion to dismiss the captioned notice of contest be, and hereby is, GRANTED and the matter DISMISSED.

Joseph B. Kennedy

Joseph B. Kennedy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FEB 4 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. NORT 78-337-P A/O No. 44-02277-02004V
v.	:	
CLINCHFIELD COAL COMPANY, Respondent	:	Moss No. 3 Preparation Plant

DECISION

Appearances: Eddie Jenkins, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Gary W. Callahan, Esq., The Pittston Company Coal Group, Lebanon, Virginia, for Respondent.

Before: Judge Charles C. Moore, Jr.

Inspector Daniel S. Graybeal, a surface mine inspector for MSHA, conducted a regular health and safety inspection at Clinchfield Coal Company's Moss No. 3 Preparation Plant on November 29, 1977 (Tr. 8), and during the course of inspecting the plant's thermal drying system (Tr. 10), Inspector Graybeal found that the bypass relief gate for the No. 3 furnace was not working (Tr. 11). This particular plant had four furnaces, each with two dryers (Tr. 11).

Inspector Graybeal asked foreman Ernest Serber to have the furnace operator simulate an emergency shutdown. This is accomplished by stopping the dried coal transfer screw which stops all drying components except the exhaust fan. 1/ This was done, but the bypass gate did not open (Tr. 12). An emergency shutdown was simulated three more times and each time the bypass gate failed to open (Tr. 12). Inspector Graybeal then asked a local union representative to disconnect the air hose leading to the air motor that closes the bypass gate under pressure. The bypass gate still failed to open (Tr. 12). The protection door which normally allows heat from the furnace to rise into the dryers closed during the emergency shutdown, as it should (Tr. 23).

1/ There is a dispute as to this statement which will be discussed later.

Although Inspector Graybeal did not have a clear line of vision to the furnace from his location on the feed and discharge screw platform next to the bypass gate, he could see smoke rising up from the area of the furnace during the shutdown. None of the other dryers were shut down at this point (Tr. 28).

The inspector issued an unwarrantable failure order. This order was terminated 1 hour and 10 minutes after it was issued (Tr. 45). Inspector Graybeal was called back to reinspect the bypass relief gate (Tr. 46). In checking the gate, he observed it would only open part way and he refused to terminate the order until the bypass gate would open completely (Tr. 46). Employees of Respondent tied a 15-pound metal weight to the arm of the bypass gate to give it more leverage so that it would open (Tr. 46-47). The bypass gate then operated properly and the order was terminated.

The furnace operator on the day shift informed Inspector Graybeal that the bypass gate was last checked on November 21, 1977 (Tr. 43). Four other employees of Respondent did not know when the bypass gate had been most recently inspected (Tr. 75).

The last unwarrantable failure order issued to the Moss No. 3 Preparation Plant was written on October 12, 1976. During that 11-month interval, no complete health and safety inspections were conducted by MSHA at the plant to verify abatement of the unwarrantable failure citation, or for any other reason (Tr. 97).

A plant electrician was called to the No. 3 furnace to check the bypass gate after the order was issued and before it was abated. He testified that he unhooked the air hose to the bypass gate and found that the gate operated properly (Tr. 145). The electrician called one of the foremen and told him that he could not find anything wrong with the bypass gate (Tr. 45). He had watched the bypass gate open when he unhooked the air hose (Tr. 147).

Frank Hall, the plant superintendent, testified that no time had been lost due to a malfunctioning bypass gate during the week the citation was issued (Tr. 165).

There is no doubt that thermal dryers can be hazardous and that the chance of explosion or fire is greater during startup and shutdown than during normal operation of the dryer. Hot gases from the furnace enter the main part of the dryer where coal and coal dust is present and ignition of the coal dust sometimes occurs. It was explained that there is sometimes incomplete combustion in the furnace and thus some flammable gases reach areas where coal dust accumulates and that if an ignition occurs these gases would add to the severity of a coal dust ignition. It is not at all clear however, how the failure of the bypass gate could lead to an explosion in the dryer. The last page of Exhibit M-2 contains a schematic diagram of the thermal dryer involved in this case. The furnace portion of the dryer is constructed of an inner wall which is firebrick hung on a framework with no mortar and an outer wall which, although mortared, nevertheless has substantial openings therein. When the system is operating the exhaust fans cause air to be drawn in through the furnace openings and out of the furnace up past the protection door into the main part of the dryer. When the protection door is closed no gases from the furnace can be sucked up into the dryer, and the purpose of the bypass gate is to disburse the combustion products via a bypass stack leading to the outside rather than having these products exit the furnace through holes in the furnace itself. Even with the protection door closed (the bypass gate has no function unless the protection door is closed), I am unconvinced that an explosion hazard existed. I cannot accept the inspector's speculation that sufficient pressure might build up in the furnace to force open the protection door. According to the inspector, there were two 16-inch square openings at the top corners of the furnace (this is the outside wall of the furnace) and at the bottom some bricks were left out to provide an airflow (Tr. 70). With the protection door and the bypass gate closed, smoke could be forced through the furnace openings until the fire smothered itself. The smoke coming out of these openings may constitute a hazard, but not an explosion hazard.

Although there is some question about it, I am going to assume that the thermal dryer operator used the proper emergency shutdown procedures. According to the note at the bottom of page 4 of the emergency shutdown procedures (Exhibit M-2), stopping the dried coal screw will stop the complete system in sequence except for the exaust fan. Respondent's superintendent however, testified that the note was erroneous and that the other steps listed on the same page would have to be taken in order to shut down the system in sequence. Inasmuch as the inspector asked the dryer operator to simulate an emergency shutdown and observed that the bypass gate did not close and that smoke was coming from the bottom of the furnace (indicating the protection door had closed), he established a prima face case that the bypass gate was not working properly. If the dryer operator acted improperly, it was the burden of Respondent to rebut the prima face case by showing that some step in the shutdown procedure was omitted. It has failed to make such a showing. I therefore find that there was a violation of the safety standard.

The inspector issued the unwarrantable failure order because four tries were made to simulate the emergency shutdown and in each case the bypass gate would not open. It is clear that I do not have any authority to review the unwarrantability finding or the order during a civil penalty proceeding. In *Zeigler Coal*, 2 IBMA 216 (1973), the Board of Mine Operations Appeals decided that the validity of a withdrawal order is not an issue in a civil penalty proceeding. Subsequent cases under the 1969 Act decided by both the Board and the Commission unerringly follow *Zeigler* (*Wolf Creek*, PIKE 78-70-P, March 26, 1979; *Pontiki*, 1 FMSHRC 1476 (October 1979); *Jewell Ridge*, 3 IBMA 376 (1974); *Plateau Mining*, 2 IBMA 303 (1973); *Buffalo Mining*, 2 IBMA 327 (1973); *North American Coal*, 3 IBMA 93 (1974), *cf*. *Freeman Coal*, 2 IBMA 197 (1973)). This is the rule whether the improperly considered order was an unwarrantable failure order (*Wolf Creek*, *supra*; *Jewell Ridge*, *supra*; *Pontiki*, *supra*; *North American Coal*, *supra*), or an imminent danger withdrawal order (*Zeigler Coal*, *supra*; *Plateau Mining*, *supra*; *Buffalo Mining*, *supra*; *cf*. *Freeman Coal*, *supra*).

I think a distinction should have been made between orders that depend on a violation of a health and safety standard, such as unwarrantable failure orders, and imminent danger orders which need not be supported by any violation of a health and safety standard. An imminent danger can exist when there is no violation, but the idea of there being an unwarrantable violation but no violation is self-contradictory. If I had found that there was no violation proved in this case, the effect of that finding would be to show the invalidity of the order but I could not vacate that order. Assuming my decision was affirmed, there would be a final legal determination that no violation had occurred and at the same time, an equally final and valid order stating that an unwarrantable failure violation had occurred.

In the instant case, I have found that a violation occurred and while I cannot review the unwarrantability of the violation I can find and do find that Petitioner has not proved negligence in this case. 2/ The bypass stack has to open in both emergency and normal shutdowns and there was no evidence that prior to the date of the inspection this bypass stack had failed to operate properly. The fact that in four separate tries the inspector and dryer operator could not get the bypass stack to open, shows that there was something wrong with it but it does not prove that Respondent knew or should have known that something was wrong with it. Respondent is a large company and has a substantial history of violations and it abated the violation promptly and in good faith. I find the evidence establishes a low order of gravity and that a penalty of $300 is appropriate.

ORDER

IT IS THEREFORE ORDERED that Respondent pay to MSHA, within 30 days of the issuance of this decision, a civil penalty in the amount of $300.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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2/ This makes it unnecessary for me to consider Respondent's contention that it was prevented from escaping the unwarrantable chain by MESA's failure to conduct a complete inspection for 11 months.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 5 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	Complaint of Discharge, Discrimination, or Interference
CHARLES W. MILLER, Applicant	Docket No. LAKE 79-282-D CD 79-158
v.	No. 24 Mine
OLD BEN COAL COMPANY, Respondent	

DECISION

This is a proceeding under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977. Applicant alleges that he was removed from his position as face boss at Old Ben's No. 24 Mine because of his "insistence that the men working under me do so under safe conditions and in compliance with [F]ederal law." A hearing was held in St. Louis, Missouri, on November 28 and 29, 1979. The parties were represented by counsel, and have filed post-hearing briefs.

At the hearing, Applicant, J. B. Gibbs, John Barwick, George Jenkins, and Dennis Benns testified for Applicant. Lester Grogan, Roger Roper, Robert Travelstead, and James Green testified for Respondent. Ernest Duckworth testified for Applicant as an adverse witness, and for Respondent.

FINDINGS OF FACT

The parties stipulated and I find:

1. Old Ben Coal Company (Old Ben) is engaged in the coal mining business in the State of Illinois, with its home office at 125 South Wacker Drive, Chicago, Illinois 60606, and a regional office at 500 North DuQuoin Street, Benton, Illinois 62812.

2. Charles W. Miller was employed by Old Ben as an underground miner from June 3, 1974, to July 25, 1977.

3. On or about July 25, 1977, Mr. Miller was promoted by Old Ben to a management position as a section boss (sometimes referred to as a "face boss").

4. Mr. Miller performed his management duties at Old Ben's No. 24 Mine.

On February 27, 1979, Old Ben fired Applicant. Applicant contends that he was discharged because he had made complaints regarding various safety matters. Old Ben contends that Applicant was fired because he disobeyed orders and in other respects was not a satisfactory employee.

In support of his case, Applicant alleges that his conduct in connection with four separate safety-related incidents resulted in his discharge. These incidents are:

1. The "four-violation incident," which occurred on or about July 18, 1978;

2. The "telephone incident," which occurred on or about July 21, 1978;

3. The "roof-bolting incident," which occurred in mid-December 1978; and

4. The "longwall incident" of February 26, 1979.

The Four-Violation Incident

On July 18, 1978, Applicant worked the 4 p.m.-to-midnight shift as the face boss of a continuous miner crew. When he entered the company's conference room at approximately 3:30 p.m., he learned that a Federal inspector had discovered certain safety violations in his section of the mine. Four of these violations had to be corrected by 8 a.m. the following morning, and Applicant was told that this would have to be done by his crew. 1/ The key issue with respect to this incident concerns Applicant's testimony that he was directed by mine superintendent Lester Grogan to correct the violations and load coal at the same time. Applicant stated that when Mr. Grogan found out that no coal had been loaded on Applicant's shift, he became angry. Applicant testified that Robert Travelstead, Old Ben's safety director, shut down the continuous miner until a broken bolt under the seat was fixed. Applicant contends that it would have been unsafe to operate the continuous miner without first correcting the violations, and therefore that his refusal to follow Mr. Grogan's instructions was justified. Additionally, Applicant stated that there was no rock dust in his section of the mine, and thus he was unable to correct the rock dust violation.

1/ Applicant testified that correcting the violations involved replacing a headlight on a continuous miner, replacing a broken bolt in an electrical panel under the seat of the continuous miner, cleaning up the area, and doing rock dusting. The testimony of Respondent's witnesses, including Old Ben's safety director, Robert Travelstead, indicates that the four violations found by the MSHA inspector did not include the broken bolt under the seat, but did include a permissibility electrical violation. Mr. Travelstead and Old Ben's mine superintendent, Lester Grogan, testified, and I find, that the broken bolt was found after the inspection. I do not believe, however, that this fact is material to the legal issues presented in this case.

Respondent's witnesses testified that Applicant was not told to operate the machinery while the violations remained uncorrected. Mr. Grogan testified that he told Applicant to fix the electrical violation and the headlight on the continuous miner before operating it. He added that when he later learned of the broken bolt under the seat, and Mr. Travelstead's order to shut down the machine, "the matter was dropped * * *." Mr. Grogan's version of these events was corroborated by the testimony of Mr. Travelstead. None of the testimony of Applicant's fellow employees confirmed Applicant's testimony that he was ordered to mine coal and repair the violations simultaneously.

The Telephone Incident

Applicant's testimony concerning the telephone incident is essentially consistent with that of Respondent's witnesses, as well as several of Applicant's co-workers. The telephones broke down in Applicant's section around July 21, 1978, and were inoperable for two or three days. Management claims that it did not know that the phones were broken, and that the situation was remedied as soon as the problem was made known to it. Applicant and his fellow employees contend that management was informed of the situation, and that after one or two days the workers refused to mine coal until the telephones were repaired. The workers felt that this was an unsafe situation. Management agreed that the miners should not mine coal in the section until the telephones were repaired, and the miners were given jobs shoveling coal elsewhere. There is no evidence, however, that Applicant was responsible for, or involved in, this refusal. One of the miners testified that Applicant "had nothing to do with it." Nor does it appear that management blamed him for this incident.

The Roof-Bolting Incident

Toward the end of November 1978, Applicant became a section boss of a crew that operated a longwall miner. 2/ When he was transferred to this position, he received eight hours of instruction on the operation of this equipment. For about the first two weeks, he worked under an experienced face boss on the longwall miner, and then assumed those duties himself. He was not, as other mine personnel were, sent to Rend Lake College for longwall instruction.

The roof-bolting incident occurred in mid-December 1978 in the longwall area during the midnight-to-8 a.m. shift. Some of the roof had fallen, and there was a crack in the roof which made it appear unsafe. Applicant's crew had planned to cut down the roof area around the fall, since Applicant felt it would be unsafe to bolt the roof. However, Ernest Duckworth, the longwall coordinator, instructed the crew to bolt it anyway. At this point, Duckworth left the area. The men started to bolt the roof when Roger Roper,

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2/ A longwall miner is a complicated and sophisticated machine which moves along a section of face approximately 460 feet long, shearing off coal as it moves. Twelve people are required to operate such a device, which costs approximately seven million dollars. The section boss thus holds a very reponsible position.

the mine manager, arrived. When Roper learned of the situation, he told the men to move the roof-bolting machine back out of the way because the roof looked unsafe. Shortly after the machine was moved, the roof fell in. Applicant testified that men could have been killed if they had been under the roof, and the machine could have been damaged. Apparently, an argument ensued in which Roper blamed Applicant for doing bolting which was dangerous, and Applicant blamed Duckworth for giving him the order to do something which Applicant felt was wrong. Applicant also resented the fact that Duckworth usurped Applicant's authority. There is no indication, however, that Applicant made a safety complaint in connection with this incident.

The Longwall Incident

On February 26, 1979, there was a severe blizzard along the eastern seaboard of the United States. Of between 100 and 125 men who were supposed to work the midnight-to-8 a.m. shift at Old Ben's No. 24 Mine, only six, including Applicant, reported to the mine. These six men were assigned to a make-shift crew on the longwall machine. Another man who reported to work was posted at the face of the mine to relay telephone messages for safety purposes. The crew on the longwall machine included Applicant, another foreman named Palmowski, and four other men who were either trainees or just off of trainee status. None of the other men knew how to operate a longwall miner. At the beginning of the shift, Superintendent Grogan told Palmowski that he wanted Applicant, who was in charge of the crew, to have the men replace some "flights" [3] on the longwall machine. Approximately 75 flights on the chain had to be bolted into place, a task which required that the machine be started and the chain moved into position. The equipment did not have to be actually operated, however, and it was not near the face. Applicant contends that he did not know how to operate the machine; that his crew was incapable of operating it; that he was totally unfamiliar with the machine's control panel; and that in order to start the machine, it would have been necessary to short out its methane detector. [4] Applicant felt that this would be a violation of safety laws. Respondent pointed out that Applicant was not being asked to mine any coal with the machine, but merely to start it and move the belt so that the flights could be replaced.

Applicant's crew did not replace any flights on that day. He assigned the men to do other work. It was not until three or four hours after the shift began that Mr. Roper telephoned the crew and learned of this. Applicant was fired the following day.

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[3] A flight is a metal bar about four inches in diameter and twelve inches long which is attached to a chain that drags coal towards the conveyor after it is cut from the face. The flights had to be installed because the longwall miner had recently been moved to a new panel. During the move, the flights had been removed.

[4] The methane detector on a longwall miner is a device which stops the machine from operating if methane is sensed. On the day in question, the detector was broken, rendering the machine inoperable unless the detector was circumvented.

Concluding Findings and Conclusions of Law

For Applicant to prevail in this action, he must show that his safety-related actions constituted "protected activity." This concept has received considerable attention from the courts under both the 1969 and 1977 Mine Acts. The leading case is Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975). There, the Court held that the plaintiff's notification to his foreman of possible dangers was an "essential preliminary stage" of those actions which bring the protection of the Act into play. 5/ Id. at 779. This view, in the Court's opinion, represented a compromise between two extremes which the parties had urged upon it:

> "We do not think that merely because a discharge originates in a disagreement between a foreman and a miner that the Mine Safety Act is automatically brought into play. Nor do we adopt the other extreme, take the bare words of the statute with their most limited interpretation, and hold that before a miner's safety complaint is accorded the protection of the Safety Act the coal miner must have instituted a formal proceeding with the Secretary of Interior or his representative. Rather, we look to: the overall remedial purpose of the statute * * *; the practicalities of the situation in which government, management, and miner operate; and particularly to the procedure implementing the statute actually in effect at the * * * mine."

The issues to be determined are whether Applicant's action in any of the incidents crossed the line from a "disagreement" to "notification * * * of possible dangers * * *."

With respect to the four-violation incident, Applicant made no safety complaint. Applicant's testimony that he was directed to repair the violations in question and load coal simultaneously was not corroborated by the testimony of any of his fellow miners, and was expressly contradicted by Mr. Grogan and Mr. Travelstead. Similarly, the telephone incident did not involve such a complaint. Applicant merely informed management of the need for a telephone in his section of the mine. There is no evidence that he was responsible for the refusal of his men to work until the phones were repaired, nor is there any indication that management blamed him for the workers' refusal.

The roof-bolting incident was, in my opinion, a mere "disagreement" between Applicant and management. Admittedly, Applicant was caught between the orders of two of his superiors and, as is often the case in such a situation, some hard feelings resulted. Applicant believed that Mr. Duckworth gave him an instruction to do something which was dangerous. When his men started to carry out those orders, Applicant found himself arguing with

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5/ While Phillips was decided under the 1969 Act, it remains the leading case defining the concept of "protected activity" under the 1977 Act.

Mr. Roper. Roper agreed with Applicant that the roof should not be bolted, and ordered the crew to move the equipment away from the roof. Clearly, there was no safety complaint made by Applicant to Mr. Roper, as the two men agreed that the situation was unsafe. Furthermore, Applicant's discussion with Mr. Duckworth did not cross the line from a "disagreement" to a "complaint."

Thus, if Applicant is to prevail in this case, he must show that there was something about the longwall incident which resulted in his being discriminated against for making a safety complaint.

It is pertinent to note that none of the prior incidents occurred within three months of the date of Applicant's discharge. Although Mr. Grogan and other management witnesses indicated that they never placed any information in Applicant's personnel file, nor issued anything else in writing, which indicated that they were in anyway dissatisfied with Applicant's performance, there was considerable credible testimony concerning various sources of friction between Applicant and other management officials. For example, Applicant testified that he was always very safety-conscious, and that he often became concerned when the crew before him did not clean up the worksite properly, attach the sucker hose, 6/ or bolt and maintain the roof in a safe condition. Grogan testified that it was common for each crew to blame the previous one for such circumstances. He added that Applicant often did not clean up his own area as much as he he should have, and that as a result, Applicant's section was the source of an abnormally high number of safety violations. Grogan testified that Applicant often disobeyed instructions, and blamed other shifts and upper management for his own problems. There was also testimony that Applicant resented being assigned to the longwall crew since this entailed working on Saturdays and Sundays.

I agree with Mr. Grogan's assessment of Applicant as a very intelligent worker with a good deal of potential. Obviously, there was some friction between the parties, but I do not find that this was due to Applicant's having made safety complaints. The pivotal question here is whether Applicant's refusal to obey his orders to replace the flights on the longwall miner constitutes a safety complaint for which he can claim protection under the Act. The evidence indicates that Applicant was not as well trained in the operation of the longwall miner as he should have been. Although he may have been able to figure out how to start the machine on the day in question, he was justified in declining to do so without further instructions. However, I am more impressed with the fact that he was told to replace the machine's flights at the beginning of his shift, and although a telephone was available, he did not inform management of his feelings until the shift was almost half over and then only after Mr. Roper telephoned him. I think it was incumbent upon Applicant to register his complaint immediately, and tell his supervisor that he could not perform his

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6/ A sucker hose is an exhaust hose which keeps the mine face free of methane and other harmful gases.

assigned duties without further instructions on the operation of the machine. Instead of doing this, Applicant simply disobeyed his supervisor's directions. That type of conduct is not protected under Section 105(c) of the Act.

ORDER

The complaint is DISMISSED.

Edwin S. Bernstein

Edwin S. Bernstein
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 6 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. KENT 79-105
v.	:	Chisholm Mine
PIKEVILLE COAL COMPANY Respondent	:	

DECISION

Appearances: Darryl A. Stewart, Office of the Solicitor, U.S. Department of Labor, for Petitioner;
John M. Stevens, Esq., Stephens, Combs and Page, Pikeville, Kentucky, for Respondent.

Before: Judge Lasher

This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Lexington, Kentucky, on December 20, 1979, at which both parties were well represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proferred by counsel during closing argument, I entered a detailed opinion on the record. It was found that the violation charged in the withdrawal order did occur. My oral decision, containing findings, conclusions and rationale appears below as it appears in the record, other than for minor corrections in grammar and punctuation:

> Turning to Docket No. KENT 79-105, that docket contains one charge of violation of section 30 CFR 75.400, the 75.403 violation having been dismissed for failure of evidence previously in this proceeding.
>
> The question involved is whether or not the accumulations as charged in the withdrawal order did exist, and if so, what the amount of penalty should be based upon the statutory penalty assessment criteria and any other relevant factor which might stand either in mitigation or aggravation of the amount of penalty.

As I have previously noted in my decision in the review proceeding which is related to this penalty proceeding, I find no question on the record but that the accumulations as described by inspector Vernon P. Hardin in the order of withdrawal did exist. There was no really serious challenge to the existence of such accumulations. I found specifically in the review proceeding that Inspector Hardin's testimony describing the appearance of these accumulations, the fact that the rock dusting was inadequate, and the depth and extent of the same, to be credible. And I so find here.

Having found that the accumulations existed, and that does constitute the violation itself, I conclude that a violation of 30 CFR 75.400 occurred.

I also find that this is a large company from the standpoint of a three-size spectrum--small, medium and large--since it had approximately 270 employees at the time of the violation, 285 employees at the present time, and since its coal production annually runs approximately 680,000 tons per year. To be more specific, I also find that if one were to take only the large category of coal companies, that this is not one of the giants, certainly, of the coal industry, nor would it be one of the middle range coal companies. This would be one of the smaller of the large coal companies.

I find that the history of previous violations for this company is average for a company of this size based upon the stipulation of the parties, and also based thereon, that any penalty that I assess in this case and which I am going to be assessing in this proceeding will not affect the company's ability to continue in business.

Turning now to the third statutory penalty assessment factor, whether or not the respondent company proceeded in good faith to abate the cited violation, I can only conclude that the company did proceed in ordinary good faith to abate this violation, there being no evidence to the contrary. I do note in this connection, in viewing abatement, that even though the inspector first sighted the violation at 9 o'clock, the abatement period would run from the time of the issuance of the order of withdrawal (approximately 2-1/2 hours later). It would not run from 9 o'clock to 11:30. It did appear to me that perhaps the operator here was a little slow in correcting the problem. On the other hand, it does appear that the scoop broke down with a defective hose at the wrong time, and perhaps other unanticipated misadventures occurred.

With respect to the seriousness of the violation, I find that 10 employees were exposed to a hazard which itself could be either fire or an explosion. As I have previously noted in the related review proceeding, I do not find this hazard to be an "urgent" or an "imminent" one. I do find this to be a serious violation. Accumulations are one of the serious violations, and as the Commission has recently noted in its decision in Old Ben Coal Company, which issued within the last month, this type of violation is one of the kinds which contributed to the passage of the 1969 Federal Coal Mine Health and Safety Act since it is the cataclysmic or disaster-type of violation. This type of violation will normally be found to be serious.

In connection with negligence, I find the delay between 9 o'clock and 11:15 which the operator engaged in to be adverse to any argument that the penalty should be nominal or small. One of the things which was not shown is whether or not, when a dangerous situation occurs and a piece of machinery designed to correct that situation malfunctions, there is a backup procedure or backup equipment or the like to cure it. If a fire is in progress and you have a hose which does not work, it would seem to me that there should be a backup procedure which would take care of a such a serious condition, or else some procedure or means of diverting another piece of machinery from another operation into an area where a danger occurs. While I do not find gross negligence, and it is very close to gross negligence in my estimation, I find a high degree of negligence in this case for allowing this type of condition to exist for that period of time.

I know of no other factors to consider with respect to this violation.

In summary, I do find that that violation occurred and that the penalty factors of seriousness, negligence and size of the company mandate a substantial penalty. The MSHA proposed assessment of $1,000 is a substantial penalty. I see no reason to increase it. On the other hand, I see no reason to reduce that penalty on the basis of this record. So a penalty of $1,000 for the 75.400 violation contained in Withdrawal Order 065134, dated December 20, 1978, is assessed and the Respondent is directed to pay the same to the Secretary of Labor within 30 days from receipt of my written decision which will issue after this hearing."

ORDER

Respondent, Pikeville Coal Company, is ORDERED to pay a penalty of $1,000 to the Secretary of Labor within 30 days from the issuance date of this decision.

Michael A. Lasher, Jr.
Michael A. Lasher, Jr.,
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 6 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 79-165
Petitioner :
v. : Chisholm Mine
:
PIKEVILLE COAL COMPANY, :
Respondent :

ORDER APPROVING SETTLEMENT

At the hearing in Lexington, Kentucky, on December 20, 1978, a settlement of the two violations involved in the above docket was accomplished in the total sum of $975 (Citation No. 65011--$445 and Citation No. 65130--$530). MSHA's total initial assessment was $1,640.

This settlement is approved for the following reasons:

1. MSHA concedes that its initial evaluation of proper penalties may have been excessive based upon its initial overevaluation of the statutory factor relating to Respondent's good faith in abating the two violations in question.

2. The violative conditions described in Citation Nos. 65011 and 65130 are not inherently conditions of sufficient severity to warrant higher penalties absent aggravated surrounding circumstances.

3. The settlement amounts are substantial.

ORDER

Respondent, if it has not previously done so, is ORDERED to pay the stipulated penalties totaling $975 in the above docket to the Secretary of Labor, within 30 days from the issuance date of this order.

Michael A. Lasher, Jr., Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 6 1980

PIKEVILLE COAL COMPANY, Contestant	Contest of Order
v.	Docket No. PIKE 79-66
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Order No. 65134 December 20, 1978 Chisholm Mine

DECISION

Appearances: John M. Stephens, Esq., Stephens, Combs & Page, Pikeville, Kentucky, for Contestant;
Darryl A. Stewart, Assistant Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, for Respondent.

Before: Judge Lasher

This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Lexington, Kentucky, on December 20, 1979, at which both parties were well represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proferred by counsel during closing argument, I entered a detailed opinion on the record. 1/ It was found that the violation charged in the withdrawal order did occur. My oral decision, containing findings, conclusions and rationale appears below as it appears in the record aside from minor corrections in grammar and punctuation:

> This proceeding involves an imminent danger withdrawal order, No. 065134, issued on December 20, 1978, which is the subject of both a penalty proceeding and an application for review.
>
> Turning first to Docket No. PIKE 79-66, which is the proceeding for review of the order, the issue presented is

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1/ Tr. 146-151.

whether or not the physical conditions described in the order did exist, and if so, if such conditions constitute an imminent danger, as that term is defined in section 107(a) of the 1977 Federal Mine Safety and Health Act.

I preliminarily note that whether or not an imminent danger exists is not dependent upon the existence of an actual violation of any of the mandatory safety and health standards.

I also preliminarily note that two violations of such standards were specifically stated in the withdrawal order, one of which, the violation of 30 CFR 75.403, has been previously dismissed upon motion by the Government, and properly I think, when it appeared that the sampling technique was inadequate.

The withdrawal order describes the condition as follows: "Loose coal and inadequate rock dust in depths of three and a half inches to ten inches deep in the Numbers 2 through 8 Entries and connecting rooms, including the last open crosscut outby the face." The withdrawal order contains other language which I deem it unnecessary to quote.

The evidence presented indicates that the depth of the accumulations was from 3-1/2 to 10 inches, based upon the testimony of the inspector, which I do find credible.

The inspector also indicated, and I find, that the accumulations ran from 50 to 100 feet in six of the entries and for approximately 200 feet in the No. 4 entry.

I find that the condition existed on an active working production shift and that had an imminent danger existed some 10 employees would have been exposed.

Since I conclude that there is really no serious question, nor has there really been a strong challenge to the evidence indicating the existence of the accumulations as described in the order, I do find that the accumulations did exist. The question then becomes whether or not these physical conditions constitute an imminent danger.

The record reveals that the inspector arrived on the section in the area where the accumulations existed at approximately 9 o'clock on the morning of December 20, 1978. At that time, he observed the accumulations but made no measurements. Nor did he take any samples of the accumulations to determine combustibility.

The inspector did visually observe the accumulations and believed that they had been inadequately rock dusted, that there was "a thin layer" of rock dust over the material which appeared to him to be very black. On the other hand, at 9 o'clock in the morning, the inspector, visually observing this condition, took no action. He returned approximately 2 to 2-1/2 hours later and the condition was found to have remained present in the area. At this time, the inspector who is an "electrical inspector," and who was not equipped with a sampling kit containing sampling equipment to measure combustibility, did take samples, but these were processed in such a way that the same appeared to be inadequate for proper sampling analysis. This led in turn to the dismissal of one of the two violations specifically cited in the withdrawal order, that in 30 CFR 75.403.

The inspector testified that there was present in the area where the accumulations were present a roof bolting machine which had splices in its cable, but he also indicated that the splices were adequate and that there was nothing wrong with the splices. He also testified that occasionally shuttle cars were known to come in and out of the area but that there were none at the time he observed the condition.

I thus find that there was only one potential, I underline potential, ignition source in the area.

In concluding that an imminent danger has not been established in this case, I emphasize that one of the bases for finding no imminent danger is that this was not the type of situation one normally would encounter with respect to ignition sources where the imminent danger flows out of accumulations. In this case, there was no evidence indicating that there were sparks actually flying from any piece of machinery or equipment. There was no evidence, for example, that there was a belt roller grinding in accumulations or that there was arcing from some defective piece of equipment. Nor was there evidence in this case that there were numerous potential ignition sources which would perhaps increase the likelihood that a spark or a fire would result from it, which in turn would be aggravated by the existence of accumulations or which would combine with accumulations to create an explosion.

Here we have, really, one piece of equipment which is in operable condition. I find that while there was a hazard, that it is not shown to be imminent. It is not shown to be urgent.

In that same connection, I note that the inspector observed substantially the same situation at 9 o'clock and yet, did not do anything about it. So this detracts somewhat, in my thinking--had this been a blatant or a clear cut situation where one senses urgency or imminence to a hazard, and a serious hazard, that one would act to clear the area upon the initial observance of the same.

The Government's evidence with respect to imminent danger, and its position in this case, is also deteriorated by the fact that the evidence of combustibility of the material has substantially fallen by the wayside by the problem with the sampling technique, which led to the dismissal of the 75.403 charge and which in turn, I do note, was described by the inspector in the withdrawal order itself.

So for those various reasons, I am unable to conclude that an imminent danger did exist and, accordingly, Order No. 065134, dated December 20, 1978, is ordered vacated, the application for review in this case, having been found to be meritorious.

ORDER

The application having merit, Order of Withdrawal No. 065134 is VACATED.

Michael A. Lasher, Jr.

Michael A. Lasher, Jr., Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 8 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner
v.

THE PITTSBURG & MIDWAY COAL
MINING COMPANY,
Respondent

Civil Penalty Proceedings

Docket No. BARB 79-307-P
A.O. No. 15-11348-03002

Docket No. BARB 79-285-P
A.O. No. 15-11348-03001

Docket No. PIKE 79-129-P
A.O. No. 11348-03004 F

Docket No. KENT 79-74
A.O. No. 15-11348-03006

Docket No. KENT 79-180
A.O. No. 15-13348-03007

Docket No. KENT 79-367
A.O. No. 15-13348-03009

Docket No. KENT 79-269
A.O. No. 15-11348-03008

Docket No. KENT 79-99
A.O. No. 15-11348-03003

Pleasant Hill Surface Mine

Docket No. KENT 79-229
A.O. No. 15-02021-03005

Colonial Strip Mine

DECISIONS

Appearances: Marvin Tincher, Attorney, Office of the Regional Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the petitioner;
George M. Paulson, Esq., Denver, Colorado, for respondent;
Harold A. Hintze, Esq., Salt Lake City, Utah, for proposed intervenor Ford, Bacon and Davis Utah, Inc.

Before: Judge Koutras

Statement of the Proceedings

These consolidated civil penalty proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). Hearings were conducted in Docket Nos. BARB 129-P, BARB 285-P, and BARB 79-307-P, in Evansville, Indiana, on August 22, 1979, and the parties appeared and were represented by counsel. Subsequently, the petitioner filed proposals for assessment of civil penalties in Docket Nos. KENT 79-74, KENT 79-180, KENT 79-269, and KENT 79-367, and on motion by the respondent, these four dockets were consolidated with the three heard in Evansville. The motion was granted because of respondent's assertions that all of these cases involve the same legal issues as those covered by the Evansville hearings, namely the question of whether the proposals for assessment of civil penalties should have been served on certain independent contractors and subcontractors performing construction work for the respondent at its Pleasant Hill Surface Mine. Further, respondent's motions of February 4, 1980, concurred in by the petitioner, to consolidate Docket Nos. KENT 79-99 and KENT 79-229, with the previously-filed seven dockets was granted.

During the August 22, 1979, hearings the parties indicated that they would jointly prepare and file with me a proposed stipulation and order for disposition of the cases which were heard, and that such stipulation would address the question of contractor and subcontractor responsibility and liability for the citations which were the subject of those proceedings. Thereafter, by letter received October 11, 1979, petitioner advised me that the parties were unable to agree upon the terms of a stipulation and proposed order as contemplated by the Evansville proceedings and that they had likewise failed to agree as to appropriate language in a motion by petitioner for continuance of the cases to which respondent would have no objection. At the same time, petitioner filed a motion for an indefinite continuance of all of the dockets pending final action by the Commission on the question concerning the Secretary's discretion to cite a mine/owner-operator for violations attributable to independent contractors on the mine property. In support of its motion, petitioner asserted that the parties were unable to stipulate all facts which would make a resumed hearing in these dockets unnecessary, but that a decision by the Commission in MSHA v. Monterey Coal Company, HOPE 78-469 through HOPE 78-476, which addresses the question of the Secretary's discretion to cite the mine owner, may be dispositive of the liability question and that the legal questions regarding the right of certain contractors to intervene herein as respondents and the appropriate entities to be held accountable for the violations as such violations might affect respondent's non-compliance history in future penalty assessments can then be resolved on the basis of the present record or on a stipulation of additional facts which do not appear to be in dispute.

On October 22, 1979, respondent filed a motion in opposition to the petitioner's motion for an indefinite continuance pending the Commission's decision in the Monterey case, and requested that I proceed with decisions in these cases. In support of its opposition to any further delay, respondent argued that by awaiting the Commission's decision in Monterey the decisions in the instant cases will be unduly delayed and that even if petitioner prevails in Monterey it will likely continue to cite mine owner-operators for administrative convenience rather than to carry our what respondent believes is the intent of Congress, namely, to cite the independent contractor responsible for the violations. Respondent also requested that its contractor, Ford, Bacon & Davis Utah and certain subcontractors be allowed to intervene and be substituted as parties in these proceedings, that I accept the offer of the contractor and certain named subcontractors to pay the civil penalties to which they admit responsibility and liability, that respondent be dismissed as a party respondent from all of these proceedings, and that none of the penalties for violations assessed in these proceedings be charged against respondent's history of violations at its Pleasant Hill Mine.

Relying on the Commission's decisions in MSHA v. Monterey Coal Co., HOPE 78-469 and HOPE 78-476, November 13, 1979, and MSHA v. Old Ben Coal Company, VINC 79-119, October 29, 1979 which, I concluded were dispositive of respondent's "independent contractor" defenses in these dockets, I issued an order on December 10, 1979, and made the following rulings with respect to the motions filed by the parties:

1. Respondent's motion to permit its contractors and subcontractors to intervene and be substituted as parties was DENIED.

2. Respondent's request to permit such contractors and subcontractors to pay the civil penalties for which they claim responsibility was DENIED.

3. Respondent's motion that it be dismissed as the respondent in these proceedings was DENIED.

4. Petitioner's motion for an indefinite continuance was DENIED.

My order of December 10, 1979, directed the parties to advise me of any stipulations or agreements as to all issues not in dispute, and any remaining issues which may be required to be tried by additional hearings. In compliance with my order, respondent advised me by letter dated January 9, 1980, that the parties were in the process of preparing a stipulation which, together with the record and exhibits made at the hearings of August 22, 1979, would enable me to decide the case without the need for further evidentiary hearings. Regarding the independent contractor/mine-owner issue, respondent asserted that the factual question as to why MSHA elected the respondent as the party to bring these enforcement proceedings against is still unresolved, but in light of the history of the problem which indicates that the sole reason it is the respondent is MSHA's continued policy of enforcing violations committed by independent contractors against the owner of the mine at which the contractor is employed, respondent suggested that the record contains sufficient evidence for me to decide this issue and it specifically makes reference to hearing Exhibits R-1 through R-3, which are identified as follows:

> (R-1) - November 17, 1978, Memorandum from MSHA Assistant Joseph O. Cook to MSHA District Managers advising them that "[P]ending issuance of regulations to identify independent contractors, the instructions contain in memorandums dated June 3 and June 17, 1975, subjects, "Contractors Associated with the Coal Mining Industry" and "Violation Citations Issued to Contractors," respectively, remain in effect.
>
> (R-2) - June 3, 1975, Memorandum from former MSHA Assistant Administrator John W. Crawford to MSHA District Managers, citing the District Court decision in ABC v. Morton, and instructing all MSHA enforcement personnel to cite mine operators for all violations observed when inspecting contractors performing work on coal mine property.
>
> (R-3) - June 17, 1975, Memorandum from MSHA Assistant Administrator Crawford to MSHA District Managers, following-up on his June 3 memorandum, instructing MSHA enforcement personnel to issue violation citations committed by contractors to the mine owner if the citations have not already been processed under section 109 of the 1969 Act.

In addition to the independent contractor issue, respondent also requested that I make certain additional findings in regard to the following points of law in my final order concerning these cases:

> 1. Whether these citations will become part of the citation history of the Pittsburg & Midway Coal Mining Co. for the purposes of 30 C.F.R. §100.3(c).
>
> 2. Whether the negligence involved in these citations must legally be attributed solely to the independent contractor actually committing the safety violation or whether it can also be attributed to the owner on a theory of vicarious liability.
>
> 3. Whether the fact that the citations involved in these cases were issued at later dates than the citations involved in the cases of MSHA v. Old Ben Coal Company, Docket No. 79-119 and MSHA v. Monterey Coal Co., Dockets HOPE 78-469 - HOPE 78-476, affects the applicability of the Old Ben Coal Company decision to these cases in light of the different facts involved in and the basis of decision used by the Mine Safety and Health Review Commission in the Old Ben Coal Company case.

4. Whether the fact that the independent contractors involved in these cases have petitioned for intervention and identified themselves to MSHA as the parties legally responsible for the violations involved in these cases affects the applicability of the Old Ben Coal Company decision in light of the different facts involved in and the basis of decision used by the Mine Safety and Health Review Commission in the Old Ben Coal Company case.

In further response to my order of December 10, 1979, petitioner advised me by letter dated January 9, 1980, that the parties had reached agreement on a stipulation which they believe will enable me to dispose of the cases without further hearing and that as soon as it is finalized it would be filed with me for further consideration. In addition, petitioner advised that the agreement reached did not represent a proposed settlement of the cases since the parties are seeking to preserve their appeal rights in light of developments in the Old Ben and Monterey cases.

On January 25, 1980, the petitioner and the respondent submitted their joint stipulation and agreed that these proceedings may now be disposed of on the basis of the present record and documents filed, including all pleadings, motions, exhibits, transcript of hearing, orders and stipulations and that the parties' rights of appeal are expressly reserved. However, in his transmittal letter, respondent's counsel states that there remain three questions to which the parties are unable to stipulate, namely:

1. The reasons for MSHA selecting the respondent rather than the contractors for enforceement of the citations.

2. Whether the independent contractors in these proceedings are "independent contractors" within the meaning of MSHA's proposed Rules, 30 CFR 45, published in the Federal Register on August 14, 1979.

3. Whether the independent contractors involved in these cases have admitted responsibility for the citations. (In this regard, respondent invites my attention to pgs. 28-29 of the August 22 Evansville hearing where contractor's counsel Hintze stipulated to liability on behalf of at least three of the contractors).

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 CFR 2700.1 et seq.

Issues

The principal issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Additional issues raised by the parties are identified and disposed of in the course of my findings, conclusions, and rulings made in these cases.

Discussion

Docket No. BARB 79-307-P

104(a) Citation No. 399328, September 19, 1978, 30 CFR 77.1701: "The ho 012 TD-15 Dozer and 613 scraper used by Koester Const. Corporation are not provided with seat belts. Roll protection is provided. Responsibility of Roger Huser, project manager."

Docket No. BARB 79-285-P

104(a) Citation No. 399321, September 18, 1978, 30 CFR 77.1605(a): "Link belt mobile crane used by J & F Const. Co. The over head cab window is not in good condition in that the glass is broken with fragged edges. Responsibility of Roger Huser, project manager."

104(a) Citation No. 399322, September 18, 1978, 30 CFR 77.208(d): "Oxygen and acetylene tanks used by J & F Const. Co. were not secured in a safe manner. Responsibility of Roger Huser project manager."

104(a) Citation No. 339323, September 18, 1978, 30 CFR 77.1109(a): "The supply trailer used by J & F Const. Co. is not provided with a fire extinguisher. Responsibility of Roger Huser, project manager."

104(a) Citation No. 399324, September 18, 1978, 30 CFR 77.1710(e): "Ted Rodgers, working for Davco Corporation is not wearing suitable foot wear. Responsibility of Roger Huser, project manager."

104(a) Citation No. 399325, September 18, 1978, 30 CFR 77.410: "Red Ford back dump and John Deere back hoe used by Davco Corp. are not provided with back-up alarms. Responsibility of Roger Huser, project manager."

104(a) Citation No. 399326, September 18, 1978, 30 CFR 77.402: "Hand held saber saw and hand held portable grinder is not equipped with controls requiring constant hand or finger pressure to operate used by Davco Corp. Responsibility of Roger Huser, project manager."

104(a) Citation No. 399329, September 19, 1978, 30 CFR 77.1109(c)(1): "The 613 scraper and Ford 7000 service truck used by Koester Corporation are not provided with fire extinguishers. Responsibility of Roger Huser, project manager."

104(a) Citation No. 339330, September 19, 1978, 30 CFR 77.1102: "The Ford 700 service truck used by Koester Corp. is not provided with warning sign against smoking and open flame. Responsibility of Roger Huser, project manager."

104(a) Citation No. 399335, September 26, 1978, 30 CFR 77.1713(a): "Daily on-shift safety inspections are not being made and recorded by a certified person at the mine. Responsibility of Roger Huser, project manager."

Docket No. PIKE 79-129-P

This docket concerns two citations in which MSHA elected to waive the assessment formula contained in 30 CFR 100.3 in determining the civil penalties, and the citations were "specially assessed" under section 100.4.

104(a) Citation No. 399333, September 21, 1978, 30 CFR 77.400(a): "The hand held Black & Decker cut-off machine was not provided with a guard. The cut-off machine was being used by J & F construction Co. N 11. This citation was issued during a fatality accident investigation."

104(a) Citation No. 399334, September 21, 1978, 30 CFR 77.404(a):

> The Black and Decker portable hand held cut off machine was not maintained in safe working condition in that an over size unguarded blade had been installed and used. The blade disintegrated resulted [sic] in a fatality accident. The machine was rated to use no larger than a 12 inch diameter blade. The blade in use was approximately 19 inches in diameter at the time of investigation (J & F Const. Co. ID N 11).

Docket No. KENT 79-180

104(a) Citation No. 0795019, April 16, 1979, 30 CFR 77.1605(b): "The White No. 50 Chevrolet truck used by Coal Rigging Contracting Corp. was not provided with a parking brake. Responsibility of Sonny Arnold, foreman."

104(a) Citation No. 0795020, April 16, 1979, 30 CFR 77.205(b). "The travelway in draw off tunnel used by Coal Rigging Contracting Corp. was not kept clear of stumbling and tripping hazard. Responsibility of Sonny Arnold, foreman."

104(a) Citation No. 0795229, April 16, 1979, 30 CFR 77.402: "The 3/8 and 1/2 electrical drills used by Cambron Electrical Co. was not equipped with controls requiring constant hand or finger pressure to operate."

Docket No. KENT 79-74

107(a) Citation No. 400843, December 31, 1978, 30 CFR 77.404: "The hand held grinder serial No. 627199 electric powered 115 volt and RPM rated 6500 was provided with a buffing disc rated maximum 6000 RPM. This grinding device was connected to the power source. Under the supervision of J & F Construction Co. Jim Bethel."

Docket No. KENT 79-269

107(a) Citation No. 0794248, April 11, 1979, 30 CFR 77.404(a): "The Lorain Crane No. 11 operated by Coal Rigging Construction Co. at the Pleasant Hill Mine construction site is hereby ordered to be removed from service in that the hoist brake will not hold a load and the swinger will not reverse in a reasonable distance."

107(a) Citation No. 0794249, April 11, 1979, 30 CFR 77.404 (a): "The Grove Crane No. CP operated by Coal Rigging Construction Co. at the Pleasant Hill Mine construction site is hereby ordered removed from service in that the swing lock brake is not working."

Docket No. KENT 79-367

104(a) Citation No. 0797717, August 1, 1979, 30 CFR 77.204: "At tipple construction site on third floor of tipple the opening for the elevator was not protected. On second floor the opening for wash box was not protected and sump in bottom of raw coal hopper was not protected. (Coal Rigging Contractors)."

104(a) Citation No. 0797718, August 1, 1979, 30 CFR 77.205(b): "At tipple construction site on third floor and second floor of tipple travelways where persons were required to travel and work were not kept clear of all extraneous material and stumbling hazards. (Coal Rigging Contractor)."

Docket No. KENT 79-99

104(a) Citation No. 399327, September 18, 1978, 30 CFR 71.400: "Bathing facilities change room and sanitary flush toilets are not provided for the employees at the mine. Responsibility of Roger Huser, project manager."

104(a) Citation No. 399332, September 21, 1978, 30 CFR 77.701: "The electric powered hand held cut off machine was not provided with frame grounding in that a two conductor exterior cable was used and the machine was not double insulated. This machine was in service at the shop office construction site. J & F Construction Co. I.D. N 11."

104(a) Citation No. 400844, December 21, 1978, 30 CFR 77.701:

> The Fornly ram pressure machine electric motor was not frame grounded in that the grounding prong was broken off the plug and a two conductor extension cord was in use and the ventilation fan was not frame grounded in that the ground prong was missing from the plug located in the test building near the office trailers (Geological Associates) under Ford, Bacon Davis Utah Contractors.

Docket No. KENT 79-229

104(a) Citation No. 079425, May 15, 1979, 30 CFR 77.1102: "Warning signs are not posted at the liquid portable storage tank located at the Smith-Miller construction site. The responsibility of Guy Brownbuger."

104(a) Citation No. 0794254, May 15, 1979, 30 CFR 77.1109(e)(1): "Portable fire extinguishers are not provided at the liquid portable storage tank located at the Smith-Miller construction site. The responsibility of Greg Brownbuger."

Stipulations

During the hearing of August 22, 1979, the parties agreed to the following stipulations (Tr. 7-10):

> 1. Respondent Pittsburg and Midway has been inspected previously at two surface mines operated in Western Kentucky. A significant number of safety and health violations of the act involved had been disclosed by MESA and MSHA, admitted at this time, by those inspections for which ordinary negligence is conceded. Respondent exhibited good faith in correcting or abating those past violations.
>
> 2. There was no gross negligence involved in any of those violations; the number of such violations was not large and the penalties were not large.
>
> 3. The respondent is a wholly-owned subsidiary of Gulf Oil Company, and the size of its business in 1978 was approximately eight million tons of coal produced.
>
> 4. Respondent's operations, including those at the Pleasant Hill Mine, affect commerce within the meaning of the statute and any assessment of penalties approximating those proposed in the matters pending for hearing will not seriously affect P and M's ability to continue in business.

5. Copies of the citations contested in this proceeding were identified as Exhibits P-1 through P-11 and P-13. And those, as well as a copy of the report of the fatality investigation which was identified as P-12 may be received in evidence. There is no issue as to the correct sections of the safety regulations cited.

6. Respondent exhibited good faith in correcting or causing correction and abatement of the alleged conditions on which the citations involved in these proceedings are based.

7. Bill Brasher, an employee of P and M, was mine superintendent of respondent's Pleasant Hill mine during the period involved in these proceedings.

8. Roger Huser was an employee of the Gulf Mineral Resources Company, a division of the Gulf Oil Company, and was assigned to the P and M mine construction site, the Pleasant Hill surface mine.

9. No coal has been or was being mined by the respondent at the Pleasant Hill mine at the time involved in these proceedings. Preparation and construction of the facilities, including a building to house shop offices and abating [sic] facilities, plus a railraod spur track and a loading hopper were in progress under construction agreement -- a construction agreement between P and M and Ford, Bacon and Davis Utah, Inc. which will be designated hereafter as the contractor. Various parts of the construction were being carried out by subcontractors pursuant to agreements between them and the contractor. There was no privity contract between P and M and the subcontractors, including those identified in Exhibits P-1 through P-13.

Findings and Conclusions

The Independent Contractor Issue

MSHA's prevailing enforcement policy at the time the citations in these proceedings were issued was to cite the mine owner for all citations generated on its mine property, regardless of the fact that they resulted from work being done by contractors. Further, although MSHA has argued that it does not routinely issue mine identification numbers to contractors, two of the citations issued in PIKE 79-129-P, contain mine identification numbers apparently assigned to the J & F Construction Company. Further, with the exception of Citation No. 399327 (KENT 79-99) for lack of bathing and toilet facilities, and one citation issued in BARB 79-285-P (Citation No. 399335) for failure to conduct a daily onshift examination, all of the citations contain findings by the inspector that the equipment cited or the practices constituting violations resulted from work being performed by contractors, and they are identified collectively as follows:

1. Koester Construction Corporation.

2. J & F Construction Company.

3. Davco Corporation.

4. Coal Rigging Contracting Corporation.

5. Cambron Electrical Company.

6. The parties have stipulated that citation 399335 is the responsibility of contractor Ford, Bacon & Davis Utah Inc. (See also, Tr. 19).

7. Smith-Miller Construction Company (KENT 79-229).

8. Geological Associates (Citation 400844-KENT 79-99).

MSHA's enforcement policy is reflected in the aforementioned hearing Exhibits R-1 through R-3. The November 17, 1978, Memorandum (R-1), sets forth MSHA's general inspections policies, and on page 9, states as follows: "Pending issuance of regulations to identify independent contractors, the instructions contained in memorandums dated June 3 and June 17, 1975, subjects, "Contractors Associated with the Coal Mining Industry" and "Violation Citations Issued to Contractors," respectively, remain in effect."

The June 3, 1975, MSHA Memorandum (R-2), quotes pertinent portions of District Court Judge Gessell's opinion in ABC v. Morton, and contains the following instructions:

> Memoranda of April 19, 1973, "Issuing Notices and Orders to Contractors on Mine Property" and June 29, 1973, "Assignment of identification numbers to contractors," are hereby rescinded.
>
> We will continue, as in the past, to inspect mine construction work, however, where violations or other hazardous conditions or practices are observed, appropriate Notices and/or Orders shall be issued to the mine operator (they shall not be issued to the contractor or construction company unless the contractor or construction company is also the mine owner, etc.). In accordance with the Court's ruling the mine operator is responsible for the contractor's compliance with the Regulations and the Act.
>
> Effective upon receipt of this memorandum, Coal Mine Health and Safety enforcement personnel will cite coal mine

operators for all violations observed when inspecting contractors performing work on coal mine property.

MSHA's June 17, 1975 Memorandum (R-3), states as follows:

> As a follow-up to our memorandum dated June 3, 1975, concerning contractors doing mine construction work, this relates to the handling of citations issued to such contractors prior to the receipt of our June 3 memorandum.
>
> Notices and/or Orders, citing violations and issued to contractors will be reissued to the appropriate mine operator, except in instances where such citations have been processed pursuant to Section 109 of the Act, penalties paid and/or the cases closed. All such citations that have not been transmitted to the Assessment Office should be retained in the issuing office and reissued to the proper mine operator prior to transmitting.
>
> Notices and/or Orders issued to mine construction contractors, citing violations and transmitted to the Assessment Office, for processing under Section 109, but penalties have not been paid nor the case closed, will be returned to the appropriate issuing office to be reissued to the proper mine operator.
>
> In cases where Notices and/or Orders have been referred to the Associate Solicitor, Division of Mine Health and Safety, the Associate Solicitor will (1) notify the Assessment Office which will notify the District Office to reissue the Notice and/or Order to the proper mine operator and (2) file a motion to substitute parties.
>
> All Notices and/or Orders affected shall be modified and reissued to the appropriate mine operator. The following guidelines shall be adhered to:
>
> 1. Notices (and Orders citing violations) issued to contractors that have not been disposed of under Section 109 of the Act shall be modified and reissued to the appropriate mine operator.
>
> 2. In modifying and reissuing the citations, the inspector will use the date of the modification, however he will refer to the original citation by No. and date and attach a copy of the original to the modification.
>
> 3. On Modification, Form 2, following the statement, "is hereby modified as follows, * * *" use an explanation of what is being done and why, such as, By virtue of the U.S.

District Court for the District of Columbia, decision in Civil Action No. 1058-74, this modification is made to show the mine owner, in lieu of the contractor, as the operator charged with noncompliance of the cited regulations (see attachments).

Respondent's Argument

Respondent takes the position that petitioner should have cited the independent contractors identified in these proceedings for the violations described in each of the citations issued and that each of these contractors are independent contractors within the meaning of MSHA's proposed rules, 30 CFR, Part 45, published in the *Federal Register* on August 14, 1979. Under the circumstances, respondent argues that it was improper and contrary to the Act for MSHA to cite the respondent for the violations *solely* for the reason that respondent is the owner-operator of the mine. Inasmuch as the contractors have admitted responsibility for the violations, respondent argues further that they should be permitted to intervene in these proceedings and that respondent's motion that it be dismissed as a party-respondent should have been granted.

Petitioner's Argument

MSHA's position is that respondent was the operator of the mine in question at the time the citations were issued and therefore it was proper and appropriate under the circumstances to cite respondent for those violations, and that its motion to be dismissed as a party-respondent was properly denied.

It seems clear to me from the facts presented in these proceedings that at the time the citations were issued and the petitions for assessment were filed, MSHA's enforcement policy was that owner-operators were liable for the violations of their independent contractors. Although respondent has made a most persuasive and cogent argument with respect to the basic unfairness in an enforcement scheme which penaltizes a mine owner for violations over which it has no control, and which were caused by the independent contractors and did not endanger any of the mine owners' employees, I am constrained to follow the decisions of the Commission in *MSHA* v. *Old Ben Coal Company*, VINC 79-119, October 29, 1979, and *MSHA* v. *Monterey Coal Company*, HOPE 78-469 and HOPE 78-476, November 13, 1979, and I conclude that those decisions are controlling and dispositive of the independent contractor defenses raised by the respondent in these proceedings. Although the Commission seemingly recognized the folly of MSHA's continued policy decision to cite only mine owners for the violations attributable to independent contractors, it opted not to disturb that policy for the sake of "consistent enforcement." As I interpret these Commission decisions, the only conclusion I can draw is that the Commission has at this point in time given its blessing to MSHA's policy decision to enforce the Act *only* against owner-operators and not contractors, and in so doing, the Commission has specifically permitted the Secretary additional time within which to promulgate and implement his proposed independent contractor regulatory guidelines as published in the *Federal Register* on August 14, 1978, 44 *Fed. Reg.* 47746-47753. Under these circumstances, respondent's independent contractor defenses raised in these proceedings are rejected and I find and conclude that MSHA properly cited the respondent for the violations in question and that the respondent is liable for them. I am not persuaded by respondent's arguments that the factual record adduced in these proceedings indicates that the identified independent contractors are independent contractors within the meaning of MSHA's proposed rules. Those rules are at this point in time only *proposed* rules and have not been promulgated or implemented as *final* MSHA guidelines.

In *MSHA* v. *Republic Steel Corporation*, IBMA 76-28 and IBMA 77-39, decided by the Commission on April 11, 1979, it was held that under the 1969 Act, a mine owner may be held responsible for violations of the Act created by independent contractors even though none of the mine owner's employees were exposed to the violative conditions and the mine owner could not have prevented the violations. In *Old Ben*, a case decided under the *1977 Act*, the Secretary conceded that Old Ben was proceeded against under an agencywide policy to enforce the Act against only owner-operators for contractor violations. Although the Commission recognized the fact that the Secretary's enforcement policy "had its roots in the district court's decision in *ABC* v. *Morton*," which was subsequently reversed, indicated that any doubt concernng the Secretary's ability to proceed against contractors was dispelled by the passage of the 1977 Act, and observed that "if the Secretary's decision to proceed against Old Ben was made pursuant to an enforcement policy based solely on the discredited foundation of *ABC* v. *Morton*, there would be no doubt that his decision was improper," the Commission, nonetheless, affirmed *Old Ben* on the basis of the Secretary's assertion that its enforcement policy was an *interim* one pending *adoption* of its proposed independent contractor regulations.

In its posthearing briefs filed in these proceedings, respondent suggests that the facts in these proceedings may be different from those which prevailed at the time *Old Ben* and *Monterey* were decided. It further suggests that the basis for the Commission's decisions in those cases may be different from those presented here in that the citations involved in these cases were issued at later dates than those involved in *Old Ben* and *Monterey*. After careful analysis of the Commission's decisions in *Old Ben* and *Monterey*, I can find no factual distinctions in the cases, nor can I find any distinctions in the Commission's rationale for upholding the Secretary's prevailing policy. In the instant cases, it seems clear from the record that the Secretary's owners-only enforcement policy was bottomed on the *ABC* v. *Morton* decision, and notwithstanding the publication of proposed rules covering independent contractors, I can perceive no change in that policy until such time as the rules are adopted and promulgated. As I interpret the Commission's decisions in *Old Ben* and *Monterey*, the Commission has permitted the Secretary to buy additional time within which to implement his new rules for enforcement and no amount of semantical or rationalized arguments have persuaded me to the contrary, irrespective of the fact that I may disagree with the Commission's rationale or am in accord with Commissioner Backley's well-reasoned dissents with respect to the independent contractor liability issue. Under the circumstances, respondent's suggestions that there are factual differences in the cases insofar as the respondent and the proposed contractor intervenors are concerned must be rejected.

In the course of the arguments at the hearing, and in arguments presented by the respondent in its motions objecting to any continuance of these dockets, filed October 22, 1979, respondent alluded to my prior ruling of April 24, 1979, in MSHA v. Morton Salt Company, DENV 79-161-PM, where I took the position that on the facts there presented, since the independent contractors were crying out to be recognized as party-respondents ready, willing, and able to assume their responsibilities and liabilities for violations and citations issued under the Act, MSHA's continued ignoring of this fact and its rigid enforcement policy defied logic, was basically unfair, and did little to promote and assure the safety of miners. I therefore dismissed MSHA's proposals to assess civil penalties against Morton Salt for three of the citations included in its proposals, and one remaining citation is still to be adjudicated as chargeable to Morton. Since my ruling dismissing the three citations was an interlocutory ruling rather than a final decision constituting my final disposition of the case, the Commission, on June 4, 1979, dismissed MSHA's petition for discretionary review of my order as premature, and in so doing noted that it expressed no view on whether the issues raised by MSHA were reviewable through the interlocutory review procedures provided for in Commission Rules 29 CFR 2700.52 and 61. Since my Morton Salt ruling was made prior to the Commission's decisions in Old Ben and Monterey, it would now appear that my ruling dismissing MSHA's proposal to assess Morton Salt for three violations may not stand Commission scrutiny in light of the developments in Old Ben and Monterey. Under the circumstances, my prior ruling of December 10, 1979, denying respondent's motion to be dismissed as a party-respondent in these proceedings is reaffirmed.

My prior rulings made in the December 10, 1979, order denying respondent's motion to permit its contractors and subcontractors to intervene and be substituted as parties are likewise reaffirmed. In Morton Salt, I rejected a similar motion by Morton to intervene its independent contractor on the ground that my interpretation of the then-prevailing Commission Interim Rules, 29 CFR 2700.10, limited participation by certain "parties" to hearings, and that the rules may not serve as a basis for transforming such "parties" into respondents not named by the Secretary as respondents subject to civil penalty assessments. The Commission's current Rules, 29 CFR 2700.4, confer party status on operators who are "named as parties or permitted to intervene," and while subsection (c) permits the filing of a motion to intervene at any time before a hearing on the merits, and requires the party to show its interest and establish that intervention will not unduly delay or prejudice the adjudication of the issues, I can find no authority in the rules to support a substitution of a party for purposes of civil penalty assessments and respondent has cited none. Further, for these same reasons, respondent's motion of February 4, 1980, to permit contractor Smith-Miller Construction Company to intervene in Docket No. KENT 79-229, is likewise DENIED.

My prior ruling made in the December 10, 1979, order denying respondent's request to permit the identified contractors and subcontractors in these proceedings to pay the civil penalty assessments for which they claim responsibility and liability is reaffirmed. Further, respondent's assertion that Smith-Miller Construction Company has agreed to pay the penalties assessed in Docket No. KENT 79-229, insofar as it seeks an order from me accepting this agreement, is likewise rejected and DENIED. I can find no authority for summarily entering an order assessing civil penalties on the basis of a stipulation or agreement entered into by a party-respondent and a non-party contractor, nor can I find any authority for forcing MSHA to accept a unilateral offer to pay civil penalty assessments, Zeigler Coal Company, 7 IBMA 312 (1977), and it makes no difference that MSHA is unwilling to stipulate in these proceedings that the named independent contractors have each admitted responsibility for the citations and are willing to pay the penalties. With regard to this question, I find that the record as a whole supports the conclusion that the independent contractors are willing to assume responsibility for the penalties assessed in these proceedings (Tr. 28-29, 33; p. 4 of January 25, 1980, stipulation).

Fact of Violation

Respondent concedes that all of the conditions and practices described on the face of the citations issued in these proceedings constitute violations of the cited safety standards, and that the citations were properly issued (Tr. 28; January 25, 1980, stipulation, p. 2). Accordingly, I find that the fact of violation as to each of the citations issued in all of these cases has been established and they are all affirmed. Further, on the basis of my findings and conclusions concerning respondent's liability for these citations, I conclude that they were properly issued to the respondent and that the respondent is liable for any civil penalties assessed for the citations.

Size of Business and Affect of Civil Penalties Assessed on the Respondent's Ability to Continue in Business.

At the Evansville hearing, the parties stipulated that respondent is a wholly-owned subsidiary of Gulf Oil Company, and that the size of its mining business in 1978 was approximately 8 million tons of coal produced. The parties also stipulated that respondent's operations, including those at the Pleasant Hill Mine, affect commerce within the meaning of the Act. Under the circumstances, I conclude that for purposes of any civil penalty assessments levied in these proceedings respondent may be considered a large mine operator.

The parties stipulated that all of the citations issued in these proceedings were properly issued and that the proposed penalty assessment amounts are fair and reasonable under the circumstances known to have existed at the time the citations issued. Further, the parties agree and stipulate to the fact that MSHA's proposed penalties as reflected in its pleadings are appropriate to the size of respondent's business, and that payment thereof will not seriously affect respondent's ability to continue in business. The stipulation and agreement on this issue is adopted as my finding and conclusion.

Good Faith Compliance

The parties stipulated that respondent, as well as the independent contractors, demonstrated good faith in causing correction and timely abatement of the conditions or practices cited by the inspectors in these proceedings. I accept and adopt this stipulation as my finding in these proceedings.

Gravity

The gravity of the conditions or practices described on the face of each of the citations issued in these proceedings, with the probability of the occurrence of the event against which each safety standard is directed, and the employee exposure to possible injury, is reflected as follows in the January 25, 1980, stipulations:

Docket No. BARB 79-307-P

Citation No.	Standard	Probability	Exposure	Gravity of Injury
399328	77.1710(i)	moderate	2 employees	lost work days

Docket No. BARB 79-285-P

Citation No.	Standard	Probability	Exposure	Gravity of Injury
399321	77.1605(a)	moderate	1 employee	lost work days
399322	77.208(d)	moderate	4 or more	lost work days
399323	77.1109(a)	moderate	4 or more	lost work days
399324	77.1710(e)	moderate	1 employee	lost work days
399325	77.410	moderate	4 or more	permanent disability
399326	77.402	moderate	2 employees	lost work days
399329	77.1109(c)(1)	substantial	1 employee	lost work days
399330	77.1102	moderate	1 employee	lost work days
399335	77.1713(a)	moderate	30 employees	lost work days

Docket No. BARB 79-129-P

Citation No.	Standard	Probability	Exposure	Gravity of Injury
399333	77.400(a)	imminent	1 employee	permanent disability or death

399334	77.404(a)	imminent	1 employee	permanent disability or death

Docket No. BARB 79-180-P

Citation No.	Standard	Probability	Exposure	Gravity of Injury
0795019	77.1605(b)	moderate	1 employee	lost work days
0795020	77.205(b)	moderate	1 employee	lost work days
0795229	77.402	moderate	1 employee	lost work days

Docket No. KENT 79-74-P

Citation No.	Standard	Probability	Exposure	Gravity of Injury
400843	77.404	substantial	1 employee	lost work days

Docket No. KENT 79-269-P

Citation No.	Standard	Probability	Exposure	Gravity of Injury
0794248	77.404(a)	imminent	1 employee	permanent disability
0794249	77.404(a)	imminent	1 employee	permanent disability

Docket No. KENT 79-367

Citation No.	Standard	Probability	Exposure	Gravity of Injury
797717	77.204	substantial	1 employee	lost work days
797718	77.205(b)	moderate	1 employee	lost work days

All of the citations issued in these dockets, with three exceptions, were issued pursuant to section 104(a) of the Act. The one citation issued in Docket No. KENT 79-74-P, and the two citations issued in Docket No. KENT 79-269-P, were imminent danger orders issued pursuant to section 107(a). The first one ordered the removal from service of a hand-held grinder which was connected to a power source and which was equipped with an overly-rated (RPM) buffing disc. The other two ordered the removal from service of a crane which had a hoisting brake which would not hold a load and a swinger which would not operate in reverse in a reasonable distance, and a second crane which had an inoperative swing lock brake. Aside from the fact that the equipment cited was removed from service, and in addition to the stipulated characterization of the probability of any injury resulting from these citations as "substantial" and "imminent," I have also weighed the fact that the violations were cited in withdrawal orders, Zeigler Coal Company, 3 IBMA 366 (1974), and I find that these citations were serious.

In Docket No. PIKE 79-129-P, although both citations were issued pursuant to section 104(a) of the Act, for failure to provide a guard for a cut-off machine, and for using an over-sized blade on that machine, the conditions cited resulted in a fatality and the record reflects that MSHA "specially assessed" these citations in light of that fatality. Under the circumstances, I conclude and find that these two violations were very serious.

Docket No. BARB 79-307-P, concerns a citation for failure to provide seat belts for a dozer and a scraper. Although the citation reflects that the equipment was provided with roll protection, the standard requires the use of seat belts in a vehicle where there is a danger of overturning. Since the equipment was provided with roll protection, an inference may be made that the equipment cited could overturn and injure the operators. The use of seat belts would provide additional protection for the operators and I conclude that the failure to provide them as required resulted in a serious violation.

Docket No. KENT 79-99 concerns three citations for (1) failure to provide bathing, change, and toilet facilities at the mine, (2) failure to frame ground an electric hand-held cut-off machine, and (3) failure to frame ground an electric machine motor and ventilation fan. Failure to provide necessary toilet facilities could lead to hygiene and discomfort problems and I find that was a serious violation. Failure to properly ground electrical equipment could lead to shock and electrocution and I find these violations are serious.

Docket No. KENT 79-229 concerns two citations for failure to post warning signs at a storage tank and failure to provide fire extinguishers at a storage tank location. I find that in the event of a fire there would be no means to control it in view of the absence of fire extinguishers and the failure to post warning signs could lead to employees not being aware of fire hazards. I find these violations are serious.

Docket No. BARB 79-285-P concerns nine citations for (1) broken glass and fragged edges on a windshield of a mobile crane; (2) failure to secure oxygen and acetylene tanks in a safe manner; (3) lack of a fire extinguisher in a supply trailer; (4) an employee's failure to wear suitable footwear; (5) lack of back-up alarms on a dump truck and a back hoe; (6) failure to equip a saber saw and grinder with constant pressure hand or finger controls; (7) failure to provide fire extinguishers for a scraper and a service truck; (8) failure to provide a "No Smoking" sign on a service truck; and (9) failure by a qualified person to conduct and record daily onshift inspections.

Considering the circumstances described on the face of each of the aforesaid citations, and the stipulations of the parties which reflect that lost work days would result in the event of an injury caused by the conditions cited to one or more employees, I conclude that the conditions cited as violations were serious.

Docket No. KENT 79-367 concerns two citations for (1) failure to provide protection for an elevator opening in the tipple and in an opening at the wash box in the raw coal hopper, and (2) failure to maintain two tipple travelways where persons were required to travel and work clear of extraneous material and stumbling hazards. These standards are obviously intended to prevent injuries to employees from falling into unprotected openings and from stumbling or tripping in areas where they are required to work or travel, and coupled with the stipulations concerning employee exposure to such hazards, I conclude that the conditions cited as violations were serious.

Docket No. KENT 79-180 concerns three citations for (1) no parking brakes on a truck; (2) failure to keep a tunnel travelway clear of stumbling and tripping hazards; and (3) failure to equip two drills with constant pressure hand or finger controls. On the basis of the stipulations, and considering the conditions described on the face of the citations, I find these violations were serious.

Negligence

At the hearing, the parties stipulated that there was no gross negligence involved in any of the citations covered in these proceedings. Further, the subsequent stipulations filed January 25, 1980, on this issue reflect agreement by the parties that there was negligence involved in each of the citations presented in all of these dockets. Aside from the question as to the entity against whom negligence should be attributed and whether respondent should be held accountable for any negligence with respect to the conditions or practices cited as violations, I find and conclude that the record supports a finding that each of the citations resulted from a failure to exercise reasonable care to prevent the conditions or practices which were known or should have been known to exist at the time the citations issued, and that in such circumstances, the violations resulted from ordinary negligence.

With regard to the question of whether the negligence involved in the citations must be legally attributable solely to the independent contractors or whether it can also be attributable to the respondent mine owner on a theory of vicarious liability, I take note of the fact that at the time the citations were issued no coal was being produced at the mine in question (Tr. 30), and the parties stipulated and agreed that the contract (Exh. R-4) entered into between the respondent and its contractor, Ford, Bacon and Davis Utah, Inc., as well as its subcontractors with regard to the Pleasant Hill construction or mine site, reflects that each contractor had control over their respective employees as to health and safety, each had a continuing presence in the mine for a substantial period of time to perform the work that they were doing, each had complete control over their portion of the work, and the only control that the Pittsburg and Midway Coal Mining Company had was as to the results to be obtained. Further, the parties stipulated that Ford, Bacon and Davis Utah, Inc., is an independent contractor, that it is not the agent of respondent Pittsburgh and Midway Mining Company in performing the work, that the contractor had control of the work, and that the respondent mine owner only had an interest in the results to be obtained from that work (Tr. 15-16). Further, the January 25, 1980, stipulation reflects an agreement by the parties that Ford, Bacon and Davis Utah's subcontractors, namely, J & F Construction Company, Koester Contracting Corporation, Davco Corporation, Coal Rigging Contracting Corporation, and Cambron Electrical Company, may be considered for purposes of these proceedings, during the periods involved, as independent contractors. As such independent contractors they were engaged in clearly-defined areas of mine construction work prior to and in preparation for respondent's putting its Pleasant Hill Surface Mine into actual production of coal. Each of said independent contractors was engaged in a major work and exercised a continuous presence at the mine during the periods designated.

It is clear that while the absence of any negligence on the part of an operator does not absolve him from liability for a civil penalty, that fact may however be weighed in mitigation in determining the amount of any civil penalty assessed for the violation, Webster County Coal Corporation, 7 IBMA 264 (1977), and the cases cited therein. It follows therefore, that if the record establishes that a mine owner is not negligent for violations attributed to an independent contractor who has exclusive control and supervision over the work site, and no employees of the mine owner are exposed to any hazard caused by those violations, the mine owner should not be penalized for such negligence. One of the statutory criteria which must be considered under section 110(i) of the Act in the assessment of civil penalties for violations which have been established is the negligence of the operator. Accordingly, while I have found the respondent liable for the citations which were issued, and while respondent is liable for any civil penalty assessments resulting from those citations, I conclude that since the facts presented in these proceedings establish that any negligence which occurred as a result of the conditions or practices cited as violations resulted from a lack of reasonable care on the part of the identified contractors and subcontractors cited, the respondent should not bear the burden of any increased assessments based on that negligence. In addition, since the parties stipulated that the contractors were not the agents of the respondent, I further conclude that any theory of vicarious liability may not serve as a basis for increasing any assessments levied against the respondent.

History of Prior Violations

During the Evansville hearing, MSHA's counsel characterized the Pleasant Hill Mine site as a "construction site", that it is a new mine, and that these proceedings in fact constitute the first time that any violations have occurred at that mining operation (Tr. 22). Counsel also indicated that in view of these circumstances no assessment points for prior history were levied against the respondent by MSHA's Assessment Office in its initial evaluation of the citations, and the Assessment Office limited its consideration of prior history to that mine (Tr. 23). Although counsel indicated that the respondent has two other surface mines in operation within the Western Kentucky area which have generated what he characterized as a "significant number of violations," he also qualified this statement by indicating that the number is "not large" and that in each instance the violations involved only ordinary negligence (Tr. 24-25). MSHA has submitted no additional information concerning the overall prior history of the respondent separate and apart from the information relating to its Pleasant Hills mining operation. I accept counsel's assertion that it is not large, and based on the stipulated facts here presented I conclude and find that for purposes of these proceedings, respondent has no prior history of violations.

Respondent's suggestions that the violations in these proceedings should not be charged against its record and should not become a part of its citation record for purposes of future proceedings is rejected. In effect, respondent is seeking a declaratory judgment from me that in any future proceedings, another Commission judge may not consider the instant violations as part of its track record. I find no authority for such a decision by me and it seems clear that prior violations which have been paid, compromised, settled, or finally ordered paid, and even those paid under protest, may be considered as part of a mine operator's prior history, Church of Latter Day Saints, 2 IBMA 285 (1973); Peggs Run Coal Company, 5 IBMA 144 (1975). Further, it is clear that the identified contractors are not respondents in these cases, and the fact that they are willing to include the violations as part of their history is immaterial. Of course, I see nothing to preclude the respondent from arguing in any future proceedings that the judge may consider and weigh the effect of those violations on any civil penalty amounts fixed against a mine owner.

Penalty Assessments

It is clear that in litigated civil penalty proceedings, the determination of appropriate civil penalty assessments for proven violations is made on a de novo basis by the presiding judge and he is not bound by any assessment method of computation utilized by MSHA's Assessment Office, Boggs Construction Company, 6 IBMA 145 (1976); Associated Drilling Company, 6 IBMA 217 (1976); Gay Coal Company, 7 IBMA 245 (1977); MSHA v. Consolidated Coal Company, VINC 77-132-P, IBMA 78-3, decided by the Commission on January 22, 1980.

In the instant proceedings, the initial civil penalty assessments which appear as part of the petitioner's initial pleadings and civil penalty proposals in the form of "assessment worksheets" as exhibits to the proposals, reflect proposed penalty amounts derived from either the application of "points" assessed for each of the statutory criteria set out in section 110(i) of the Act, or from a "special assessment" made pursuant to Part 100, Title 30, Code of Federal Regulations. The record reflects that no penalty assessment points were attributable to the respondent's prior history of violations and MSHA has admitted that this is the case. However, with regard to the question of negligence, a review of the proposed penalty assessments made by MSHA reflects that negligence "points" were assessed against the respondent for some but not all of the citations in question and this fact obviously resulted in an increase in the proposed penalty amounts. Since I have concluded that the respondent was not negligent for any of the citations, the question presented is whether I may consider this as mitigating a decrease in the proposed amounts where MSHA considered the factor of negligence in determining the proposed penalties.

The parties have stipulated that any civil penalties approximating those proposed in these proceedings will not adversely affect its ability to remain in business, that the proposed penalties are appropriate to the size of respondent's business, and that the proposed assessments are fair and reasonable amounts under the circumstances known to have existed at the time the citations were issued. MSHA has recommended no penalties as part of its posthearing arguments or stipulations, and apparently rests on the initial evaluations made by its Assessment Office, and respondent makes no further arguments that it is in entitled to any penalty reductions for lack of negligence on its part. However, I believe that section 110(i) mandates consideration of the element of negligence on a case-by-case basis, and if the record supports a reduction in penalties, basic fairness dictates that respondent is entitled to it even though he has not specifically pleaded for a reduction. Further, as I view the stipulations with respect to the reasonableness of the proposed assessments, they were obviously made on the basis of negligence attributable to the respondent and as such, I conclude that I am not bound by them, particularly in light of my finding that the absence of any negligence attributable to the respondent may be considered in mitigation of the penalties which I may assess. Accordingly, as to each citation where no negligence points were assessed against the respondent, except for those "specially assessed", I find them to be reasonable and I adopt them as the penalties assessed by me in these proceedings. With regard to those citations which took into account any negligence by the respondent, including those "specially assessed", I find that reductions are warranted and they are reflected in the assessments levied me in these proceedings. I might add that had the named contractors been before me as parties, absent any mitigating circumstances, or the presence of any aggravating factors, the initial proposed assessments may or may not have been disturbed.

On the basis of the foregoing findings and conclusions made in these proceedings, civil penalties are assessed in each of these dockets as follows:

Docket No. KENT 79-180

Citation No.	Date	30 CFR Section	Assessment
0795019	4/16/79	77.1605(b)	$50
0795020	4/16/79	77.205(b)	45
0795229	4/16/79	77.402	45

Docket No. KENT 79-367

Citation No.	Date	30 CFR Section	Assessment
0797717	8/1/79	77.204	$80
0797718	8/1/79	77.205(b)	50

Docket No. KENT 79-74

Citation No.	Date	30 CFR Section	Assessment
400843	12/21/78	77.404	$175

Docket No. KENT 79-269

Citation No.	Date	30 CFR Section	Assessment
0794248	4/11/79	77.404(a)	$205
0794249	4/11/79	77.404(a)	200

Docket No. KENT 79-129-P

Citation No.	Date	30 CFR Section	Assessment
399333	9/21/78	77.400(a)	$1,500
399334	9/21/78	77.404(a)	350

Docket No. KENT 79-307-P

Citation No.	Date	30 CFR Section	Assessment
399328	9/19/78	77.1710(i)	$20

Docket No. BARB 79-285-P

Citation No.	Date	30 CFR Section	Assessment
399321	9/18/78	77.15605(a)	$25
399322	9/18/78	77.208(d)	44
399323	9/18/78	77.1109(a)	25
399324	9/18/78	77.1710(e)	30
399325	9/18/78	77.410	60
399326	9/18/78	77.402	25
399329	9/18/78	77.1109(c)(1)	50
399330	9/18/78	77.1102	44
399335	9/26/78	77.1713(a)	25

Docket No. KENT 79-99

Citation No.	Date	30 CFR Section	Assessment
399327	9/18/78	71.400	$15
399332	9/21/78	77.701	35
400844	12/21/78	77.701	45

Docket No. KENT 79-229

Citation No.	Date	30 CFR Section	Assessment
794253	5/15/79	77.1102	$45
794254	5/15/79	77.1109(e)(1)	30

ORDER

The respondent IS ORDERED to pay the penalties assessed in these proceedings in the amounts shown above, totaling $3,218 within thirty (30) days of the date of these decisions.

George A. Koutras
Administrative Law Judge

Distribution:

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Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 8 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner
v.

KERR-MCGEE COAL CORP.,
Respondent

: Civil Penalty Proceedings
:
: Docket No. DENV 79-461-P
: A/O No. 48-01096-03003
:
: Docket No. DENV 79-460-P
: A/O No. 48-01096-03002
:
: Docket No. DENV 79-462-P
: A/O No. 48-01096-03004
:
: East Gillette No. 16 Surface Mine

DECISION

These cases concern four citations and one order issued to Respondent for safety violations committed by independent construction contractors operating at Respondent's "East Gillette No. 16 Surface Mine."

Having stipulated that the facts contained in the citations are true, and that the proposed penalties are reasonable, both parties submit that the only issue remaining is whether Respondent was the proper party to be cited.

After MSHA v. Monterey Coal Co., 1 FMSHRC 1781 (November 1979), it is clear that Respondent was properly cited. The Commission based its decision in that case on MSHA v. Old Ben Coal Co., 1 FMSHRC 1480 (October 1979), wherein it held that until final rules were promulgated, the practice of citing owner-operators for independent contractor violations would be upheld for reasons of consistent enforcement.

Based upon the foregoing and the parties' stipulation, I find Respondent was properly cited for the violations contained herein.

ORDER

It is therefore ORDERED that Respondent pay to MSHA, within 30 days, a civil penalty in a total amount of $796.

Charls C Moore, Jr
Charles C. Moore, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 8 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: Civil Penalty Proceedings : : Docket No. SE 79-2-M : A/O No. 54-00036-05003
v.	:
DAVID CABRERA, INC., Respondent	: Docket No. SE 79-53-M : A/O No. 54-00036-05006 : : Cantera Dorado

DECISION

ORDER TO PAY

Appearances: Edwin Tyler, Esq., Office of the Solicitor, U.S. Department of Labor, Santurce, Puerto Rico, for Petitioner;
Tadeo Negron Medero, Esq., Rafael Castro, Esq., Santurce, Puerto Rico, for Respondent, David Cabrera, Inc.

Before: Judge Merlin

The above-captioned cases are petitions for the assessment of civil penalties filed by the Mine Safety and Health Administration against David Cabrera, Inc. A hearing was held on January 8, 1980.

At the hearing, the parties agreed to the following stipulations (Tr. 3-5):

> 1. The legal name of the respondent is David Cabrera, Inc.
>
> 2. The identification of the mine where the inspection was conducted is Cantera Dorado.
>
> 3. The location of said mine is Dorado, Puerto Rico.
>
> 4. David Cabrera, Inc., is the operator of said mine.
>
> 5. During the period from June 29, 1978, to January 8, 1979, a duly authorized representative of the Federal Mine Safety and Health Administration, namely Pedro Sarkis, conducted inspections at respondent's aforesaid Cantera Dorado Mine under the Federal Mine Safety and Health Act of 1977, hereinafter referred to as the Act.

6. As a result of an inspection conducted on January 5, 1979, Citation Number 94112 was issued to respondent for failure to comply with an order of withdrawal previously issued to respondent on September 26, 1978, in relation to its bulldozer Komatzu D-155.

7. The parties stipulate that all orders, citations, extensions and notifications attached to the Solicitor's petition in the Commission's files are true and accurate with respect to the facts set forth therein.

8. Respondent employs approximately 27 employees at Cantera Dorado.

9. Respondent employs 10 employees during one shift daily, six days per week, 52 weeks per year.

10. Each of the employees of respondent works approximately 44 hours per week.

11. The parties stipulate that respondent has a small history of previous violations.

12. The annual manhours worked at respondent's Cantera Dorado Mine in 1978 and 1979 were approximately 52,000 manhours respectively.

13. Respondent was the owner and had control of bulldozer Komatzu D-155 and Caterpillar D-8.

14. The payment of the penalty as assessed will not affect respondent's ability to continue in business.

15. The parties stipulate that citation numbers 93314, 93315, and 94112 correctly cited violations of the Act.

16. The parties stipulate that MSHA Exhibit 1 is true and accurate respecting the facts stated therein.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 1-29). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact, and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench (Tr. 29-30). A decision was rendered setting forth findings, conclusions, and determinations with respect to the alleged violations (Tr. 32-37).

Bench Decision

The bench decision (which was simultaneously translated in Spanish for the benefit of respondent) is as follows:

These two consolidated cases involve noise violations on two bulldozers for which two citations were issued.

The operator has admitted the violations. The parties also have agreed that the facts as set forth in the inspector's citations, extensions and orders, all of which have been admitted into the record or are attached to the pleadings, are true and accurate with respect to the facts set forth therein. Both citations were originally issued on June 29th, 1978. Numerous extensions were given simultaneously on both bulldozers with respect to both citations until September 6, 1978.

Thereafter, citation 93315 on the D-8 bulldozer was eventually abated on October 10, 1978, within the time allowed. The Solicitor has recommended a penalty of $40, the originally assessed amount for this violation. I conclude this is a reasonable penalty for this violation. Accordingly, a penalty of $40 is assessed for this citation.

The story with respect to citation number 93314 issued with respect to the 155 bulldozer is unfortunately much different. The record reflects that on September 6, 1978, the inspector gave an extension until September 11, 1978. The inspector also testified that on September 12 and September 20 he spoke with the operator's brother who is the plant manager and with the operator's son who is the plant supervisor, and that although the materials for abatement were present, the operator did not abate the violation. The inspector issued a withdrawal order on September 26, 1978.

The Solicitor recommends a penalty of $370, the originally assessed amount for this citation for which a withdrawal order was issued. Under the circumstances, including repeated advice from the inspector to the operator, despite which there was a failure to abate, I cannot agree with operator's counsel that this amount is excessive. On the contrary, I conclude this amount to be reasonable on the facts presented.

If the operator cannot abate the citation within the time allowed, particularly where many extensions have been given and substantial time has elapsed, then the operator has a responsibility to inform the inspector why abatement has not been accomplished and, moreover, to justify to the inspector why a further extension should be given. It is not the inspector's function to chase after the operator.

This, however, is not the end of the matter. These consolidated cases also contain a petition for the assessment of a civil penalty based upon Citation 94112, dated January 5, 1979, issued for failure to comply with the withdrawal order on the 155 bulldozer. It appears from the inspector's testimony and from MSHA Exhibit No. 1 that another citation not at issue in these proceedings was issued on November 28, 1978, also for failure to comply with the subject withdrawal order. Apparently, after the withdrawal order was issued, the operator continued to use the machine in defiance of the withdrawal order. However, the inspector also testified that after the November 28 citation was issued, the operator did some work on November 29 and November 30 with respect to abating the noise violation but that this abatement had not been completed.

The operator must understand that it cannot ignore withdrawal orders issued by inspectors of the Mine Safety and Health Administration, especially where, as here, the inspector's uncontradicted testimony demonstrates he told the operator what the effect of the withdrawal order was, i.e., that the equipment in question must not be used until the withdrawal order is terminated by an inspector no matter what work has been done on the equipment for abatement. If the operator believes the inspector is wrong, he can go to the inspector's superiors or he can request and obtain a hearing before a Judge within four days or even less if the parties agree. The operator has avenues of relief against erroneous actions by inspectors. What the operator does not have is the right to disregard these orders as if they did not exist. If an inspector removes a piece of equipment from service, then it cannot be used until the operator obtains the proper permission to do so.

The operator must understand that by acting as it has done in this case, it is subjecting itself to very severe penalties indeed. Section 110(b) of the law provides that an operator who fails to correct a violation within the period permitted may be assessed a penalty of up to $1,000 for each day during which the violation continues. In addition, Section 110(d) provides that any operator who willfully violates the law shall, upon conviction, be punished by a fine of not more than $25,000 or by imprisonment for not more than one year or by both.

After listening to the testimony and conferring with the Solicitor and counsel for the operator, I have reached the conclusion that the operator's unfamiliarity with the Act played a part in its misconduct in this case. Upon questioning from the bench, the inspector's testimony indicated that the circumstances occurred during early inspections of this facility under the Act.

I also bear in mind the operator's small size and small prior history. However, the operator's actions cannot be excused and an appropriate civil penalty must be assessed. What the operator must realize is that recurrence of such conduct in the future will result in much harsher and severer punishment.

After much deliberation, I determine that $1,800 is an appropriate civil penalty for this violation. Accordingly, penalties of $40, $370 and $1,800 are assessed in this case.

ORDER

The foregoing bench decision is hereby, AFFIRMED.

The operator is ORDERED to pay $750 within 30 days from the date of this decision; $750 within 60 days from the date of this decision; and $710 within 90 days from the date of this decision.

Paul Merlin

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

Edwin Tyler, Esq., Office of the Solicitor, U.S. Department of Labor, P.O. Box 9092, Santurce, P.R. 00908 (Certified Mail)

Tadeo Negron Medero, Esq., Box 40621, Minillas Station, Santurce, P.R. 00949 (Certified Mail)

Administrator, Metal and Non-metal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 8 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 79-2-M
Petitioner	:	A/O No. 54-00036-05003
v.	:	
	:	Docket No. SE 79-53-M
DAVID CABRERA, INC.,	:	A/O No. 54-00036-05006
Respondent	:	
	:	Cantera Dorado

DECISION

ORDER TO PAY

Appearances: Edwin Tyler, Esq., Office of the Solicitor, U.S. Department of Labor, Santurce, Puerto Rico, for Petitioner;
Tadeo Negron Medero, Esq., Rafael Castro, Esq., Santurce, Puerto Rico, for Respondent, David Cabrera, Inc.

Before: Judge Merlin

The above-captioned cases are petitions for the assessment of civil penalties filed by the Mine Safety and Health Administration against David Cabrera, Inc. A hearing was held on January 8, 1980.

At the hearing, the parties agreed to the following stipulations (Tr. 3-5):

1. The legal name of the respondent is David Cabrera, Inc.

2. The identification of the mine where the inspection was conducted is Cantera Dorado.

3. The location of said mine is Dorado, Puerto Rico.

4. David Cabrera, Inc., is the operator of said mine.

5. During the period from June 29, 1978, to January 8, 1979, a duly authorized representative of the Federal Mine Safety and Health Administration, namely Pedro Sarkis, conducted inspections at respondent's aforesaid Cantera Dorado Mine under the Federal Mine Safety and Health Act of 1977, hereinafter referred to as the Act.

6. As a result of an inspection conducted on January 5, 1979, Citation Number 94112 was issued to respondent for failure to comply with an order of withdrawal previously issued to respondent on September 26, 1978, in relation to its bulldozer Komatzu D-155.

7. The parties stipulate that all orders, citations, extensions and notifications attached to the Solicitor's petition in the Commission's files are true and accurate with respect to the facts set forth therein.

8. Respondent employs approximately 27 employees at Cantera Dorado.

9. Respondent employs 10 employees during one shift daily, six days per week, 52 weeks per year.

10. Each of the employees of respondent works approximately 44 hours per week.

11. The parties stipulate that respondent has a small history of previous violations.

12. The annual manhours worked at respondent's Cantera Dorado Mine in 1978 and 1979 were approximately 52,000 manhours respectively.

13. Respondent was the owner and had control of bulldozer Komatzu D-155 and Caterpillar D-8.

14. The payment of the penalty as assessed will not affect respondent's ability to continue in business.

15. The parties stipulate that citation numbers 93314, 93315, and 94112 correctly cited violations of the Act.

16. The parties stipulate that MSHA Exhibit 1 is true and accurate respecting the facts stated therein.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 1-29). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact, and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench (Tr. 29-30). A decision was rendered setting forth findings, conclusions, and determinations with respect to the alleged violations (Tr. 32-37).

Bench Decision

The bench decision (which was simultaneously translated in Spanish for the benefit of respondent) is as follows:

These two consolidated cases involve noise violations on two bulldozers for which two citations were issued.

The operator has admitted the violations. The parties also have agreed that the facts as set forth in the inspector's citations, extensions and orders, all of which have been admitted into the record or are attached to the pleadings, are true and accurate with respect to the facts set forth therein. Both citations were originally issued on June 29th, 1978. Numerous extensions were given simultaneously on both bulldozers with respect to both citations until September 6, 1978.

Thereafter, citation 93315 on the D-8 bulldozer was eventually abated on October 10, 1978, within the time allowed. The Solicitor has recommended a penalty of $40, the originally assessed amount for this violation. I conclude this is a reasonable penalty for this violation. Accordingly, a penalty of $40 is assessed for this citation.

The story with respect to citation number 93314 issued with respect to the 155 bulldozer is unfortunately much different. The record reflects that on September 6, 1978, the inspector gave an extension until September 11, 1978. The inspector also testified that on September 12 and September 20 he spoke with the operator's brother who is the plant manager and with the operator's son who is the plant supervisor, and that although the materials for abatement were present, the operator did not abate the violation. The inspector issued a withdrawal order on September 26, 1978.

The Solicitor recommends a penalty of $370, the originally assessed amount for this citation for which a withdrawal order was issued. Under the circumstances, including repeated advice from the inspector to the operator, despite which there was a failure to abate, I cannot agree with operator's counsel that this amount is excessive. On the contrary, I conclude this amount to be reasonable on the facts presented.

If the operator cannot abate the citation within the time allowed, particularly where many extensions have been given and substantial time has elapsed, then the operator has a responsibility to inform the inspector why abatement has not been accomplished and, moreover, to justify to the inspector why a further extension should be given. It is not the inspector's function to chase after the operator.

This, however, is not the end of the matter. These consolidated cases also contain a petition for the assessment of a civil penalty based upon Citation 94112, dated January 5, 1979, issued for failure to comply with the withdrawal order on the 155 bulldozer. It appears from the inspector's testimony and from MSHA Exhibit No. 1 that another citation not at issue in these proceedings was issued on November 28, 1978, also for failure to comply with the subject withdrawal order. Apparently, after the withdrawal order was issued, the operator continued to use the machine in defiance of the withdrawal order. However, the inspector also testified that after the November 28 citation was issued, the operator did some work on November 29 and November 30 with respect to abating the noise violation but that this abatement had not been completed.

The operator must understand that it cannot ignore withdrawal orders issued by inspectors of the Mine Safety and Health Administration, especially where, as here, the inspector's uncontradicted testimony demonstrates he told the operator what the effect of the withdrawal order was, i.e., that the equipment in question must not be used until the withdrawal order is terminated by an inspector no matter what work has been done on the equipment for abatement. If the operator believes the inspector is wrong, he can go to the inspector's superiors or he can request and obtain a hearing before a Judge within four days or even less if the parties agree. The operator has avenues of relief against erroneous actions by inspectors. What the operator does not have is the right to disregard these orders as if they did not exist. If an inspector removes a piece of equipment from service, then it cannot be used until the operator obtains the proper permission to do so.

The operator must understand that by acting as it has done in this case, it is subjecting itself to very severe penalties indeed. Section 110(b) of the law provides that an operator who fails to correct a violation within the period permitted may be assessed a penalty of up to $1,000 for each day during which the violation continues. In addition, Section 110(d) provides that any operator who willfully violates the law shall, upon conviction, be punished by a fine of not more than $25,000 or by imprisonment for not more than one year or by both.

After listening to the testimony and conferring with the Solicitor and counsel for the operator, I have reached the conclusion that the operator's unfamiliarity with the Act played a part in its misconduct in this case. Upon questioning from the bench, the inspector's testimony indicated that the circumstances occurred during early inspections of this facility under the Act.

I also bear in mind the operator's small size and small prior history. However, the operator's actions cannot be excused and an appropriate civil penalty must be assessed. What the operator must realize is that recurrence of such conduct in the future will result in much harsher and severer punishment.

After much deliberation, I determine that $1,800 is an appropriate civil penalty for this violation. Accordingly, penalties of $40, $370 and $1,800 are assessed in this case.

ORDER

The foregoing bench decision is hereby, AFFIRMED.

The operator is ORDERED to pay $750 within 30 days from the date of this decision; $750 within 60 days from the date of this decision; and $710 within 90 days from the date of this decision.

Paul Merlin

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

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Administrator, Metal and Non-metal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 8 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 79-3-M
Petitioner : A/O No. 54-00036-05004
v. :
DAVID CABRERA, INC., : Cantera Dorado
:
Respondent :

DECISION

ORDER TO PAY

Appearances: Edwin Tyler, Esq., Office of the Solicitor, U.S. Department of Labor, Santurce, Puerto Rico, for Petitioner; Tadeo Negron Medero, Esq., Rafael Castro, Esq., Santurce, Puerto Rico, for Respondent, David Cabrera, Inc.

Before: Judge Merlin

The above-captioned proceeding is a petition for the assessment of civil penalties for 19 alleged violations of the Act.

At the hearing on January 8, 1980, the Solicitor advised that the parties now recommended settlement of the violations in this docket number. The Solicitor explained each of the settlements in detail and stated that the gravity factor had been overassessed. Further, the operator has virtually no history of prior violations under the Act, and the Act itself is relatively new as regards this operator. The recommended settlements total $1,504, which is a substantial amount for this operator who is not large in size. 1/ In view of the circumstances which are fully set forth in the administrative transcript of the hearing, the recommended settlements are approved. It is however, a matter of concern when at the hearing the Solicitor expresses evaluations so different from that of the Assessment Office.

1/ The Solicitor incorrectly stated the total amount to be $1,554. The correct amount is $1,504.

ORDER

The operator is ORDERED to pay $1,504 in six equal payments, the first payment to be made within 30 days from the date of this decision, with subsequent payments every 30 days thereafter.

Paul Merlin

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

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Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

FEB 8 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

SOUTHERN OHIO COAL COMPANY,
Respondent

Civil Penalty Proceeding

Docket No. VINC 79-227-P
A.O. No. 33-02308-03021F

Raccoon No. 3 Mine

DECISION AND ORDER

Appearances: Linda Leasure, Esq., U.S. Department of Labor, Office of the Solicitor, Cleveland, Ohio, for Petitioner;
David Cohen, Esq., Lancaster, Ohio, for Respondent.

Before: Judge Kennedy

The captioned penalty proceeding came on for an evidentiary hearing in Columbus, Ohio on November 1 and 2, 1979. The Secretary charged that as the result of two separate occurrences on May 5, 1978, the operator violated section 302(a) of the Act, 30 CFR 75.200. The first charge was that as a result of an investigation of a fatal roof fall accident that occurred on May 5, 1978, it was determined that the victim and another miner had travelled inby permanent roof support for the purpose of removing temporary supports in violation of the prohibition against miners travelling under unsupported roof. The second charge was that the investigation revealed that at the time of the accident the victim and another miner were removing temporary supports under unsupported roof by hand instead of by some remote means and without installing other temporary support in violation of Safety Precaution No. 3 of the approved roof control plan.

At the hearing, counsel for the operator conceded the two miners in question "were engaged in the practices that were stated in the citations" (Tr. Vol. I, 16) but now claims there was only one violation. The statute, however, clearly provides that each occurrence of a violation constitutes a separate offense and there is no dispute about that the fact that two miners participated in the conduct charged and that the conduct of each was in violation of the standard. The operator is fortunate that the Secretary did not charge, as he might have, that each of the miners violated the standard twice for a total of four violations.

The operator's theory of two for the price of one is, therefore, rejected.

At the conclusion of the hearing, and in accordance with the pretrial order, the parties presented oral argument in support of their proposed findings and conclusions and the presiding judge made a tentative decision on the record. At the request of the operator, the effective date of the bench decision was stayed pending receipt of the transcript and the parties proposed findings, conclusions, and supporting briefs.

After a careful consideration of the parties' written submissions, I find my bench decision, as supplemented below, should be adopted and confirmed as my final decision in this matter. My decision, therefore, is as follows:

> After observing the demeanor of the witnesses and based on a preponderance of the reliable, probative and substantial evidence, I find:
>
> 1. The two violations charged did, in fact, occur.
> 2. Because these violations were the proximate cause of the death of a miner they were extremely serious.
> 3. The violations were the result of a disregard for compliance with safe mining practices by Socco's top management, its Section Foreman, Lonnie Darst, the miner-victim, James Six, and the miner-survivor, John Endicott.
> 4. Mr. Six's knowing disregard of the prohibition against working under unsupported roof and the safety precautions of the approved roof control plan was an act of gross negligence.
> 5. The violations were also the result of a reckless disregard for compliance with safe mining practices by the miner-survivor, John Endicott. Mr. Endicott knowingly disregarded the same prohibitions of the mandatory safety standard and the safety precautions of the approved roof control plan as did Mr. Six.
> 6. The acts of the miners Six and Endicott were foreseeable and preventable by the Section Foreman Lonnie Darst and top management. As several witnesses testified it was not unusual for miners in the Raccoon #3 Mine to work under unsupported roof (Tr. Vol. I 94, 108, 110, 131, 136, 159-160; Vol. 2 144; GX-9). Mr. Darst and top management knew or should have known this.

7. More specifically, Lonnie Darst knew or should have known that Mr. Six could not knock the six jacks in the 15 entry with the loader without damaging the jacks seriously.

8. Lonnie Darst did not tell James Six how to knock and remove the six jacks without damaging them.

9. Lonnie Darst did not tell James Six how to load the coal in the 15 entry without removing the jacks.

10. James Six and John Endicott knew they were expected to knock and remove the jacks without damaging them.

11. It never occurred to Six and Endicott to knock out the jacks with the loader because this would have damaged the jacks and seriously impeded production.

12. It is not reasonable to believe that Lonnie Darst would have directed Six to employ a means of removing the jacks that would render them inoperable.

13. Lonnie Darst and top management condoned the violations committed by Six and Endicott because they did only what was expected of them.

14. Lonnie Darst's actions as well as those of Six and Endicott are, therefore, imputable to Socco.

15. Lonnie Darst was negligent in his supervision of the 15 entry of the 001 Section on May 5, 1978.

16. Socco's management is vicariously responsible for the negligence of its agents and employees and independently responsible for its failure to design, implement and enforce a mine safety program that ensures compliance with the Mine Safety Laws at all times--not just some times--by its section foremen and miners.

17. The operator's claim that the section foreman, Lonnie Darst and top management were not involved in the violations committed is without merit. The record shows the section foreman's failure to supervise and monitor the remote recovery of the temporary supports was in violation of the safety precautions set forth in 30 CFR 75.200-14. These precautions were issued in implementation of the underlying interim mandatory standard pursuant to the Secretary's authority under section 301(d) of the Act to "prescribe" the manner in which roof support recovery is to be accomplished under roof control plans adopted and approved under section 302(a), 30 CFR 75.200 of the Mine Safety Law. Inasmuch as this criteria "prescribes" the manner in which an operator is to "carry out on a continuing basis" his program of roof control as mandated by section 302(a), 30 CFR 75.200, it is an enforceable part of the underlying interim mandatory safety standard. Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 405 and n. 32 (D.C. Cir. 1976); United States v. Finley Coal Co., 493 F.2d 285, 290 (6th Cir. 1974), aff'g. 345 F.Supp. 62, 67 (E.D. Ky. 1972). Under decisions of the Board of Mine Operations Appeals, it is well settled that once an operator adopts and the Secretary approves a roof control plan the operator is "obliged to carry out" the plan in accordance with the cirteria set forth in 30 CFR 75.200-7 through 75.200-14. Affinity Mining Company, 6 IBMA 100, 109 (1976); Bishop Coal Company, 5 IBMA 231, 241-244 (1975) (75.200-1 through 75-200-14 "fill in some of the interstices" of the operator's obligation to "adequately" support or otherwise control the roof or ribs).

18. 30 CFR 75.200-14 prescribes a detailed method for roof support recovery. Mr. Darst's conduct and instructions violated this criteria in six particulars all of which are imputable to top management. Furthermore, top management is independently responsible for its own negligent failure to supervise properly Mr. Darst's performance of his duties and responsibilities.

19. Mr. Darst's six violations of 75.200-14 were as follows:

(a) 75.200-14(a) provides that "Recovery should be done only under the direct supervision of a mine foreman, assistant mine foreman, or section foreman." It is undisputed that at the time of the fatal roof fall the section foreman, Lonnie Darst, was not supervising the recovery operation but was in the No. 13 crosscut assisting another miner in hanging power cable (Tr. Vol. II, 101, 107, 156).

(b) 75.200-14(c) required that "The person supervising recovery should make a careful examination and evaluation of the roof, and designate each support to be recovered." Mr. Darst admitted that he failed to designate the jacks to be recovered (Tr. Vol. II, 108-109). In addition, the record shows that neither Mr. Darst nor the miners involved made any effort to sound or otherwise evaluate the condition of a badly fractured roof that, in the area where the fatality occurred, was unsupported for a minimum distance of 23 feet, 9 inches. The record further shows that despite the requirement for preshift and on-shift reports of hazardous conditions the operator tolerated the existence of this massive unsupported roof area for approximately 17 hours. This constituted a reckless disregard for management's obligation to exercise a high degree of care for the safety of the miners. Legislative History of the Federal Coal Mine Health and Safety Act of 1969, U.S. Senate, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., (August 1975), at 1515.

(c) 75.200-14(d)(1) directs that "Supports should not be recovered . . . Where roof fractures are present or there are other indications of the roof being structurally weak." The record shows the operator had encountered extremely bad roof conditions while driving the 15 entry. The roof leaked substantial quantities of water which indicated the overlying strata had lost its cohesive qualities and that the overburden was fractured. During the period it was unsupported, the roof had sagged and cracked. (Tr. Vol. I, 71, 74, 87-88, 93, 96, 108, 173, 193; Vol. II, 107, 159). Mr. Darst was fully aware of the condition of the roof in the number 15 entry. This knowledge is imputable to top management. In addition, top management knew or should have known of the hazardous roof condition in the 15 entry at the time it made its determination to recover coal from the area. Its determination to do so in the face of this criterion constituted a conscious and deliberate indifference to the safety of its employees.

(d) 75.200-14(e) requires that "Two rows of temporary supports on not more than 4 foot centers, lengthwise and crosswise, should be set across the place, beginning not more than 4 feet inby the support being recovered. In addition, at least one temporary support should be provided as close as practicable to the support being recovered." It is undisputed that the only temporary supports in the No. 15 entry were those taken down by the miners Six and Endicott. (OX-8, Tr. Vol. I, 91, 120-121). The record shows Mr. Darst's instruction for tripping the jacks with the loader directly contravened this criterion, the approved roof control plan, and the requirement that the operator control the roof adequately to protect Mr. Six from a roof fall during removal of the temporary supports. Section 302(a) of the Act, 30 CFR 75.200. Mr. Darst's instruction which was tantamount to a directive to violate the safety precautions set forth in the law was negligence per se — and clearly imputable to top management which was responsible for ensuring that Mr. Darst performed his duties in accordance with the law.

(e) 75.200-14(f) provides that "Temporary supports used should not be recovered unless recovery is done remotely from under roof where the permanent supports have not been disturbed and two rows of temporary support, set across the place on 4 foot centers, are maintained at all times between the workmen and the unsupported area." Mr. Darst's instructions to knock the jacks out with the loader compelled action by Mr. Six that directly contravened this safety precaution as it was impossible to trip the jacks if two rows of temporary supports had been installed as required. Inspector Petit testified that to comply with this safety precaution and still recover the jacks it would be necessary, after setting the additional temporary support, to tie a rope around the jacks and then pull them out with the loader while remaining under supported roof (Tr. Vol. II, 59, 62-63). This, of course, would leave two rows of temporary support that could not be removed, nor could the coal. It is clear therefore that there was no way to effect remote removal of the temporary supports in compliance with the law and still recover the coal. Mr. Darst opted to flout the law and recover the coal. In doing so he set the stage for another roof fall fatality. It is a fair inference that Mr. Darst did not alone make the decision to go for the coal at the risk of a miner's life. I conclude therefore that top management of the Raccoon #3 Mine was primarily responsible for this regrettable case of institutional manslaughter.

(f) 75.200-14(h) requires that "Entrances to the areas from which supports are being recovered should be marked with danger signs placed at conspicuous locations." Mr. Darst admitted he did not danger off the unsupported roof area in entry 15 (Tr. Vol. II, 107). The failure to ensure compliance with this safety precaution was another instance of the operator's failure to carry out its obligation to protect its miners from travelling or working under hazardous roof as required by section 302(a), 30 CFR 75.200. It also constituted another instance of the operator's failure to exercise the high degree of care imposed by the Act.

20. Finally, I find that the operator's independent failure to enforce sound mining practices, as evidenced by its failure to ensure compliance with the safety precautions applicable to the remote removal of temporary supports by its section foreman and the miners Six and Endicott as well as its foreman's failure to monitor and supervise properly the remote removal of the temporary supports by the miners Six and Endicott warrant the imposition of maximum penalties for the violations charged.

I conclude therefore that for the imputed negligence of its agents and employees as well as for its own acts of independent and contributory negligence, Socco is fully responsible for the violations charged. _See_ _Valley Camp Coal Co._, 3 IBMA 463 (December 13, 1974) (section foreman's knowledge of dangerous condition imputable to operator for purpose of determining negligence); _Pocahontas Fuel Co._, 8 IBMA 136 (September 28, 1977) _aff'd_ 590 F.2d 95 (4th Cir. 1979) (failure of preshift examiner to detect violation imputable to operator); _Webster County Coal Co._, BARB 78-185-P (June 7, 1978); _Grundy Mining Co._, BARB 78-168-P (June 19, 1978), _appeal_ _pending_ No. 78-3424 (6th Circuit) (foreseeable and preventable miner's negligence imputable to operator); _Buffalo Mining Co._, HOPE 78-333-P (October 30, 1979) (independent contractor's negligence imputable to operator); _Cf._ _U.S._ v. _Illinois Central R. Co._, 303 U.S. 239 (1938) (employee's negligent breach of statutory duty imputable to employer); *Atlantic and Gulf Stevedores, Inc.* v. *OSHRC*, 534 F.2d 541 (3rd Cir. 1976) (employer liable for predictable and forseeable employee misconduct).

I further conclude that in order to deter future violations, heighten top management's awareness of the need for meaningful supervision and sanctions to backup the mine safety laws, and to ensure, if possible, voluntary compliance with those laws, the amount of the penalty warranted for each violation found is $10,000.00.

Accordingly, it is ORDERED that Southern Ohio Coal Company pay a penalty of $20,000.00 on or before Friday, March 21, 1980.

Joseph B. Kennedy

Joseph B. Kennedy
Administrative Law Judge

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David Cohen, Esq., American Electric Power Service Corp., P.O. Box 700, Lancaster, OH 43130 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 11 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner
v.
CLIMAX MOLYBDENUM COMPANY,
Respondent

Civil Penalty Proceeding

Docket No. DENV 79-396-PM
A.C. No. 05-00354-05010

Climax Mine

DECISION

Appearances: Thomas E. Korson, Esq., Assistant Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, for Petitioner;
Richard W. Manning and Katherine Vigil, Climax Molybdenum Company, Golden, Colorado, for Respondent.

Before: Judge Lasher

This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Denver, Colorado, on January 3, 1980, at which both parties were represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proffered by counsel during closing argument, I entered a detailed opinion on the record. 1/ It was found that the violation charged in the withdrawal order did occur. My oral decision containing findings, conclusions and rationale appear below as it appears in the record aside from minor corrections in grammar and punctuation:

> This penalty proceeding arose upon the filing of a petition for assessment of civil penalty by the Department of Labor on March 5, 1979, in which the Government seeks a penalty against the Respondent, Climax Molybdenum Company, for causing or permitting a condition or practice described in Citation No. 331766 which was issued by inspector James L. Atwood on August 2, 1978, and which is more particularly described as follows: "The ore pass in 3180-9 stopes, subdrift F-finger, was not provided with a bumper block or berm.

1/ Tr. 127-139.

Mobile preparation crews use this ore pass for a dumping location."

The standard involved is that provided in 30 CFR 57.9-54 which provides as part of some 73 specific loading, hauling, and dumping safety requirements which are applicable generally to surface and underground mines that: "Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations."

At the outset, it is found, based upon stipulation provided by counsel, that this is a large mine having a payroll of some 1,500 underground employees and a daily production of molybdenum of 25,000 to 28,000 tons. It is also found that Respondent had a prior history of 122 previous violations. Since I do not know during what period of time that is involved, I make no specific finding with respect to that element.

The parties stipulated that payment of the proposed penalty of $106 would not affect Respondent's ability to continue in business. I so find and, in addition, find that in view of the Respondent's size and that Respondent is itself a division of AMAX, Inc., that it would be able to pay a much higher penalty including the maximum penalty in this case without affecting its ability to continue in business.

Finally, based upon the expressed stipulation of the parties, I find that the Respondent, after being served with the citation involved here, proceeded in good faith to achieve rapid compliance with the safety standard cited in the citation by providing a berm at the site allegedly in violation.

In terms of issues, the general issues are, of course, whether or not a violation did occur and, if so, what degree of negligence, if such exists, and what degree of seriousness should be attributed to the Respondent and the condition respectively.

The primary issue in this case is a legal one which arises out of the proper interpretation which should be placed on the safety standard cited, 30 CFR 57.9-54. More particularly, the question is whether the coverage of this regulation applies when dumping is not actually going on. The issue of the construction to be given the regulation comes up based upon the defenses asserted by Respondent in this proceeding, the chief and secondary supporting arguments of such a defense being that berms are not required around finger openings except when dumping is going on and that the Respondent had a practice of using berms when dumping actually was in progress. Respondent contends that there was no dumping in progress when the alleged violation was observed by the inspector on August 2, 1978, and that its employees were instructed to use berms when carrying on dumping, and other similar contentions which relate back to the primary construction of the regulation which it urges.

Turning now to the evidence, the inspector testified and I find that on August 2, 1978, the opening reflected on Exhibit R-2, which sometimes has been referred to as the "ore pass," but generally called the "F-finger," was not filled up; that it was irregular in shape; that it was approximately 8 feet across (the Respondent contends the same was approximately 7-1/2 feet across) and that it was some 31 feet deep.

I find, based upon the inspector's testimony and that of Respondent's witness, Dick Robush, that the depth of the finger was approximately 23 feet, the first half of which was straight down and the second half of which sloped off at an angle of approximately 45 degrees. As reflected on Exhibit R-1, the finger extended from subdrift F down to an area sometimes referred to as the slusher drift area.

I would footnote that I would refer to the ore pass as the actual opening or top of the hole through which the ore was dumped into the finger.

I find that on August 2, 1978, the ore pass and the finger was not filled up. For all intents and purposes it was empty. I also find that the subdrift reflected on Exhibit R-1 and in which the ore pass was located was used as a trailway, that the ore pass abutted on one side a wall of the subdrift, that there was a 3/4-inch hemp rope suspended from the sides which hung approximately 3 feet off the ground and which had a sway in it which at the bottom was approximately three-fourths of a foot off the bottom. Part of the rope was out over the open hole.

At the time the inspector observed the condition there were equipment tracks imprinted in the bottom of the material which constituted the floor of the area, most of which followed the direction of the trailway and some of which were in the direction of the ore pass, the closest of which were some 3 to 4 feet away from the edge of the ore pass. I am unable to find when these tracks were made or by which specific type of mobile equipment the tracks were left.

I find that there was a sign in proximity to the allegedly violative condition which said "Danger--No Manway," and that the area in which the ore pass was located could at times become, as the inspector described it, smoky as a result of blasting which could take place in the mine at distances ranging from 100 yards to 1 mile from the subject area.

In this connection, I also find that while such smoky or dusty condition could in the abstract affect visibility to what extend the same would be affected cannot be found on this record and, further, that there was no such condition on the day the alleged violation was observed.

I find that when the citation was issued at 8:50 a.m., the first or morning shift was in progress, that no dumping was carried on on the morning shift, and that the last dumping which occurred into the finger in question through the subject ore pass occurred on August 1 during the swing shift (between 3:30 and 11:30 p.m.).

I find that the ore pass and finger in question, both parts of the same thing, had prior to August 2, 1978, been used as a dumping location and would have been used as a dumping location subsequent to such date. The meaning of this finding is that actual dumping had occurred at such site and would have occurred at such site subsequent to the issuance of the citation.

I specifically find that on August 2, 1978, there was no berm, bumper guard, or other suitable means or material present at the site in question which would have prevented the overtravel of vehicles or overturning of vehicles--overtravel being a vehicle's going too far and going into the opening of the ore pass.

At the time the citation was issued, the only mobile equipment in the general area depicted on Exhibit R-2 were two loaders, a 1-yard loader and a 5-yard loader. The 1-yard loader was some 16 feet long, 5-1/2 feet high and 4-1/2 feet wide, and the 5-yard loader being some 26 feet long, 6 to 7 feet high, and 8-1/2 feet wide.

In this connection, I also find that, based upon the inspector's testimony, so-called "Wagner muckers"--a vehicle used for hauling which approximates the size of a standard-size automobile running on four wheels and powered by a diesel engine--constituted the majority of Respondent's mobile equipment operating in the area. As I have noted, the tracks found in the area cannot be attributed to any specific piece of equipment including the Wagner mucker or the loaders previously described.

There were approximately four employees working in the general area depicted on Exhibit R-2 on August 2, 1978. It would have been impossible for the two loaders to proceed as depicted on Exhibit R-3 from the 400 production drift past the subdrift 22 into 3160 crosscut, and get closer than 7 feet to the ore pass opening. On the other hand, equipment could have directly turned into subdrift 22 and have been exposed to the hazard presented by the unfilled ore pass opening, which was not protected by a berm, bumper guard, or other suitable means or material to prevent overtravel or overturning.

Based upon the foregoing specific findings of fact, I make these following ultimate findings of fact: On August 2, 1978, when the citation was issued, no dumping was being conducted at the ore pass in question; the ore pass described in the citation was not protected in accordance with the specific requirements of the regulation cited, 29 CFR 57.9-54, in that no berms, bumper blocks, safety hooks, or similar means were provided to prevent overtravel and overturning; the ore pass and finger shown on Exhibit R-3 was used for dumping, even though at the specific time the inspector observed the same, dumping was not actually in progress; the ore pass in question constituted a very serious hazard to employees working or traveling in proximity to it due to its depth, its location--adjacent to a travelway, the condition of the protective rope--insofar as the same was not fastened properly, the possibility of impaired visibility, and all despite the precaution taken by management personnel in putting up a sign entitled "Danger--No Manway."

Since Respondent had other signs, some of which were more specific than the sign in question such as the ones which said "Danger--Open Finger" and one which said "Danger--Open Ore Pass," I find it possible that a sign which says "Danger--No Manway" might lead an employee into the belief that there was no danger from an open finger or an open ore pass. That is, by having specific signs which describe specific dangers, a (less) specific sign might be counterproductive. However, those are in my judgment minor considerations in comparison to the major considerations upon which (rests) my finding that the condition was a very serious hazard.

In this sense and in this respect, I fully credit the testimony of the inspector that in the event of an overturn of equipment, a fatality would probably occur. There was really no challenge to this evidence with respect to seriousness. The general description of the condition itself would lead me to find the same absent the inspector's testimony.

I turn now to the primary question which is the construction of the regulation. I first note that it's a long-established principle of mine safety law that ambiguous provisions of the law are to be construed liberally so as to enhance the safety aspects of the language. I construe that to mean that if there is an ambiguity, a regulation should be construed liberally to promote health and safety. However, I find no ambiguity whatsoever in this regulation.

I'm going to be very explicit in saying I find the argument of Respondent that the regulation should be limited to only those times when dumping is going on to be wishful thinking at best and very cynical at worst. This regulation says that berms, bumper blocks, or similar means shall be present at dumping locations. Is an open hole in the ground 7-1/2 feet long a "dumping location" only when dumping is in progress when it's (been) used for dumping within some 15 to 20 hours before it's seen to present a very serious violation? Is a piano that's not in use not a piano because there's no musician sitting there playing it?

This site was used shortly before this violation was discovered as a dumping place and was intended to be used as a dumping place subsequently. The regulaton does not say that berms, etc., shall be provided while dumping is going on. It says it shall be used at "dumping locations." In my judgment, if there was ever a dumping location, this was it, since it was one that was used very shortly before the violation was found. It would be impossible to enforce such a regulation absent having an inspector present at every single such location 24 hours a day, because you would then get down to where someone would say, "Well, it wasn't a dumping location, we were using it for ventilation or some other purpose at the time the violation was discovered."

This regulation is not just for the benefit of the employees actually engaged in dumping at some particular time. The hazard is to anybody that happens to be going along there at any time whether dumping is going on or not. The hazard is for a piece of equipment to overturn or to fall into that hole whether or not it's in the process of dumping. Are we to discriminate and limit the protection afforded by such a regulation, the hazard which it is designed to protect being so obvious, in such a way?

I find no ambiguity whatsoever and I am surprised at the position that the Respondent has taken which, as it has pointed out, has resulted in a practice wherein the berms are taken away after the dumping is over. I find, in that connection, Inspector Atwood's testimony that it was not possible for the berms to have been removed without leaving traces of their presence, to be credible. Although I credit this testimony, I do not find it necessary to make an express finding of fact in resolving the ultimate issue in this case. More specifically, I do not find it necessary to determine whether there was a berm there or not at the time the dumping occurred the previous day or other times when dumping occurred. The fact this hole was present at 8:50 a.m. on August 2, 1978, presenting a hazard as it did without the berms or other similar means of protection constitutes a violation, and I so find.

The remaining question is whether or not, in permitting the violation, the Respondent was negligent. The facts of this case indicate that this was a willful act. I'm not saying it was a willful violation. It was a willful act on the part of the Respondent based upon its understanding that it was in compliance with the regulations.

The negligence aspect of the case is not susceptible to being analyzed in terms of the normal precepts of negligence law. I do accept the Respondent's statement that in this case it had a sincere good faith belief that it was not violating the standard in question. I thus find that it is not a willful violation. If I found a willful violation, I'd have to refer this for criminal action.

Analyzing it in terms of willfulness, I would therefore find that the willfulness is excused by the good faith belief--and what I believe to be mistaken belief--that they were not in violation. This would, therefore, in my judgment equate with a low degree of negligence were we to analogize it to negligence.

Summing up then, I find that this is a large mine operator. I find that, based upon the history of previous violations, there is no reason to increase any penalty. I find that the penalty that I'm to assess will not interfere with Respondent's ability to continue in business. I have found this to be a very serious violation which was attributable to the Respondent's good faith belief that it was in compliance with the standard. And I footnote that I make such finding even though I don't find much ambiguity or any ambiguity in that standard myself. Standing in some mitigation is the fact that Respondent proceeded rapidly to abate the violation found. Weighing all those factors and again noting that I had found either willfulness or gross negligence I would have given a penalty close to the maximum which is $10,000 in this case, a penalty of $1,500 is assessed. Respondent is directed to pay the same within 30 days of issuance of my subsequent written decision which will incorporate the oral decision which I have placed on the record.

ORDER

Respondent, Climax Molybdenum Company, is ORDERED to pay a penalty of $1,500 to the Secretary of Labor within 30 days from the issuance date of this decision.

Michael A. Lasher, Jr.
Michael A. Lasher, Jr., Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 11 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. PIKE 78-420-P A. C. No. 15-08413-02012V Pontiki No. 1 Mine
v.	:	
PONTIKI COAL CORPORATION, Respondent	:	

DECISION

This matter is before me for reassessment of penalties for violations involved in three withdrawal orders after reassignment of judges pursuant to remand by the Commission's decision of October 25, 1979. The Administrative Law Judge who originally heard and decided this matter has since retired. He found the violations occurred as alleged. However, for failure of the Secretary's proof, he vacated the three section 104(c)(2) orders in question and mitigated penalties for the reason that the orders had been vacated.

In its reversal and remand, the Commission specifies only that the reassessment be made without consideration of the vacated orders as a mitigating factor. 1/ I therefore adopt the original judge's findings with respect to the six statutory criteria and incorporate such findings by reference. 2/ Although the original judge indicated that the penalties were being "mitigated due to the fact that the orders involved (were) vacated" the extent to which such reduction was carried was not described or shown. In these circumstances, my assessments will be de novo, that is, an independent evaluation of proper penalties--based, however, on the penalty assessment factors found by the original judge.

It should be further noted that (a) while this Respondent was a very large coal operator in 1977, it was not one of the giants of the industry

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1/ The Judge's finding that the violations occurred as charged by MSHA, and his findings with respect to the statutory criteria were not disturbed.

2/ These findings are summarized in his written decision of February 9, 1979, at page 20, Finding Nos. 3 through 8, and are incorporated herein by reference.

(Tr. 7-9), or affiliated with one of the giant coal-producing groups, 3/ and (b) no injuries or fatalities were involved in any of the violations. 4/

Respondent is assessed the following penalties:

Order No.	Date	Section	Penalty
1 TE	12/05/77	30 CFR 75.316	$ 250
1 MM	12/05/77	30 CFR 75.316	1,250
2 FDG	12/06/77	30 CFR 75.200	4,500
			$6,000

ORDER

IT IS ORDERED that Respondent pay to the Secretary of Labor the sum of $6,000 within 30 days from the date of this decision.

Michael A. Lasher Jr.

Michael A. Lasher, Jr., Judge

Distribution:

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3/ See (Keystone Coal Industry Manual, (McGraw-Hill, 1977), pages 546, 756, and 757, indicating that in 1977 Pontiki was in Class 4 of a 10-class spectrum with annual coal production under 1 million tons, that the largest group with which it was then affiliated was in Class 1 (the largest class) with annual production of 3 million tons or more, and that such group was not one of the top 15 coal-producing groups in 1976.

4/ Respondent's appeal to the United States Court of Appeals, D.C. Circuit, was voluntarily withdrawn and dismissed on January 30, 1980.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 11 1980

PONTIKI COAL CORPORATION,	Contest of Order
Contestant	
v.	Docket No. KENT 79-115-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Order No. 706444 May 3, 1979
Respondent	No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Civil Penalty Proceeding
	Docket No. KENT 80-53
Petitioner	Assessment Control No. 15-08413-03042V
v.	
PONTIKI COAL CORPORATION,	No. 1 Mine
Respondent	

DECISION

Appearances: William H. Howe, Esq., and Timothy J. Parsons, Esq., Loomis, Owen, Fellman & Howe, Washington, D.C., for Pontiki Coal Corporation;
John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, for Secretary of Labor.

Before: Administrative Law Judge Steffey

Pursuant to written order dated June 22, 1979, a hearing in the above-entitled [1] consolidated proceeding was held on August 9, 1979, in Pikeville, Kentucky, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

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[1] The order providing for hearing consolidated any civil penalty issues which might arise with respect to Order No. 706444 with the issues raised by Pontiki Coal Corporation's request for review of Order No. 706444. MSHA's Proposal for Assessment of Civil Penalty was filed on January 15, 1980, in Docket No. KENT 80-53 seeking assessment of a civil penalty for the violation of 30 CFR 75.403 alleged in Order No. 706444. Therefore, it is now possible to decide in this proceeding the civil penalty issues on which evidence was presented by the parties at the hearing held on August 9, 1979. My order did not consolidate the civil penalty issues raised in Docket No. KENT 80-53 with respect to underlying Citation No. 706762. Therefore, the order accompanying this decision defers all civil penalty issues pertaining to Citation No. 706762 for future disposition.

Counsel for Pontiki Coal Corporation filed on December 11, 1979, a posthearing brief and counsel for the Mine Safety and Health Administration filed on January 7, 1980, a reply to Pontiki's brief.

Issues

Pontiki's brief argues that Order No. 706444 is invalid as well as underlying Citation No. 706762 on which Order No. 706444 is based. Pontiki also contends that the violation of 30 CFR 75.403 alleged in Order No. 706444 did not occur or, in the alternative, that if a violation of section 75.403 did occur, the violation was not the result of any unwarrantable failure on the part of Pontiki.

MSHA's brief argues that a violation of section 75.403 occurred as alleged in Order No. 706444, that the violation was the result of an unwarrantable failure on the part of Pontiki, and that underlying Citation No. 706762 was validly issued and properly cited a violation of 30 CFR 75.313. Additionally, MSHA's brief claims that I am obligated to determine in my decision whether the violation of section 75.313 alleged in underlying Citation No. 706762 occurred even though Pontiki did not raise that issue in its contest of Order No. 706444. Finally, MSHA contends that a judge is obligated to consider a conglomerate's total civil penalty record of previous violations when he is evaluating an operator's history of previous violations as one of the six criteria which must be considered in assessing penalties in civil penalty proceedings if violations of the mandatory health and safety standards are found to have occurred.

Findings of Fact

My decision on all issues in this consolidated proceeding will be based on the findings of fact set forth below:

1. Pontiki Coal Corporation is a subsidiary of Mapco, Inc. (Exh. 1). In addition to Pontiki Coal Corporation, Mapco controls four other coal companies, namely, Webster County Coal Corporation, Martiki Coal Corporation, Topiki Coal Corporation, and Mettiki Coal Corporation. Mapco's five subsidiaries operate a total of nine underground and surface coal mines. Pontiki operates two underground coal mines and one preparation plant (Exh. 2). Only Pontiki's No. 1 Mine is involved in this proceeding. That mine employs 169 miners on two production shifts and one maintenance shift to produce about 3,500 tons of raw coal per day from the Pond Creek coal seam (Tr. 12). After cleaning, the No. 1 Mine's production amounts to about 3,000 tons per day (Tr. 96). The mining height ranges from 36 to 109 inches (Tr. 12; 84). The No. 1 Mine is entered by one 400-foot shaft and one slope (Tr. 12). Coal is produced from four working sections, three of which use continuous mining machines and one of which utilizes conventional mining methods (Tr. 45). The No. 1 Mine liberates approximately 450,000 cubic feet of methane over a 24-hour period (Tr. 13).

2. An MSHA inspector entered the No. 1 Mine on May 3, 1979, at about 4:30 p.m. He was accompanied by an inspector trainee and Pontiki's safety

director, Mr. Danny P. Curry (Tr. 65; 81). All three men traveled to the No. 5 Section which uses conventional mining equipment (Tr. 136). For a month prior to May 3, the inspector had been engaged in making a complete inspection of the No. 1 Mine (Tr. 14; 41). He knew from previous experience that the personnel in the No. 5 Section were having some difficulty in controlling the roof and he wanted to check the roof conditions in the No. 5 Section before finishing his inspection (Tr. 42; 45; 194).

3. The inspector, the trainee, and Mr. Curry traveled up the No. 5 or track entry to the second crosscut outby the face (Tr. 83; 137). At that point they observed a miner installing roof bolts. Mr. Curry remained at the site of the roof bolter while the inspector and the trainee walked over to return entries Nos. 6 and 7. When they returned from those entries, they were rejoined by Mr. Curry at the No. 5 entry and all three men thereafter continued their examination of the entries by walking through the last open crosscut to the No. 1 entry. They walked down the No. 1 entry to the second open crosscut. As they entered the crosscut between the Nos. 1 and 2 entries, the inspector orally advised Mr. Curry that he was issuing a "(d)" order (Tr. 139; 146).

4. Mr. Curry himself had been a former MSHA inspector (Tr. 134) and he understood that the inspector was issuing an unwarrantable failure order (Tr. 154). Mr. Curry then left the inspector for about 10 minutes so that he could call the mine superintendent, Mr. Sloan, for the purpose of letting the superintendent know that the No. 5 Section had been closed by an order (Tr. 140; 162).

5. The inspector had found that the mine personnel were doing a "good job" of supporting the roof (Tr. 91), but he found that there was insufficient rock dust on the floor of the mine (Tr. 31-38). The inspector's Order No. 706444 was written at 6:05 p.m. on May 3, 1979, and cites Pontiki for a violation of 30 CFR 75.403 because there had been an "[i]nadequate application of rock dust on mine floor in entries No. 1 through No. 7 and connecting crosscuts on No. 005-0 Section, starting at spad No. 1450 and extending inby approx[imately] 360 feet" (Exh. 5).

6. The inspector based his citation of inadequate rock dusting in seven entries and their connecting crosscuts on an examination of the crosscuts and entries which he could see by walking through the No. 5 entry to the two rows of crosscuts outby the face (Tr. 46-47; 82-83). The inspector walked through the first and second rows of crosscuts outby the face and looked down each of the seven entries. The inspector walked down the No. 1 entry for three crosscuts from the face, down the No. 2 entry for 2-1/2 crosscuts from the face, and down the No. 4 entry to the belt feeder which was located just inby the third crosscut from the face. With the exception of the No. 5 entry, the inspector did not travel any entry for a distance of more than three crosscuts from the face (Tr. 84). Although the inspector had no illumination other than his cap light, he stated that he could see a distance of from 300 to 360 feet down each entry and could determine that the floor had been inadequately rock dusted (Tr. 82; 87; 196). There were permanent stoppings between the Nos. 2 and 3 entries and

between the Nos. 5 and 6 entries for the purpose of separating the intake and return airways (Tr. 47; 86; 159-160). The inspector could not have seen what the condition of the rock dust was in the crosscuts between Nos. 2 and 3 entries and between Nos. 5 and 6 entries because his observation from entry No. 5 would have been blocked by permanent stoppings as he walked up the No. 5 entry to the working faces (Tr. 149). Those portions of the crosscuts would not have constituted a major part of the No. 5 Section and would not have existed closer than three crosscuts from the working face (Tr. 86).

7. The inspector took two floor samples and the trainee took one floor sample to support the inspector's claim that rock dust on the mine floor in No. 5 Section was inadequate. One of the inspector's floor samples was taken at a point 20 feet inby spad No. 1491 in the No. 2 entry. The inspector's other floor sample was taken in the crosscut between the Nos. 1 and 2 entries at a point which was about 50 or 60 feet from the place where he obtained the first sample. The inspector trainee's floor sample was taken in the No. 3 entry about 10 feet outby spad No. 1490, or approximately 80 feet from the place where the inspector took his first sample (Exh. C; Tr. 190-195). Thus, all three samples used to substantiate the inspector's order were taken either in or close to the second crosscut from the face and all three samples were taken within a distance from each other of about 120 feet even though the inspector's order covered the entire No. 5 Section for a distance of seven crosscuts, or about 420 feet outby the face (Exhs. 5, 6 and C; Tr. 78-79; 86). The inspector considered the three samples, two of which revealed an incombustibility of 35 precent and one of which showed an incombustibility of 31 percent, to be representative of the condition of the floor throughout the No. 5 Section (Tr. 37-38).

8. The inspector conceded that there had been spillage in the crosscut where the samples were taken, but he insisted that he did not take samples where spillage existed (Tr. 71-72). In the inspector's opinion, the amount of spillage in the crosscuts and entries near the face was not excessive and would not have justified citing Pontiki for a violation of 30 CFR 75.400 for permitting combustible materials to accumulate (Tr. 90-91).

9. Respondent's safety director introduced as Exhibit C a drawing of the No. 5 Section which he made about 2 days after the inspector's order was issued. Exhibit C shows that both of the inspector's samples were taken in places where spillage existed. The sample obtained by the trainee was taken at a place where no spillage is shown on Exhibit C, and the incombustibility of that sample was 35 percent (Exhs. 6 and C; Tr. 144).

10. The chief mine foreman, second-shift mine foreman, and third-shift mine foreman all testified that they were having trouble in controlling the roof in the No. 5 Section (Tr. 105; 112; 121; 124; 170). Timbers were being set on each side of the entry and 72-inch roof bolts on 4-foot centers were being used to support the roof (Tr. 91-92). It was also frequently necessary to install cribs as further supplemental support (Tr. 112; 124; Exh. B).

Pontiki's safety director and all three foremen stated that when additional roof supports and rock dusting needed to be done at the same time, they gave priority to installation of roof supports (Tr. 112; 124; 151; 180).

11. All three foremen testified that the cleaning and rock dusting program in the No. 5 Section consisted of cleaning and rock dusting during both production shifts as well as cleaning and rock dusting on the maintenance shift (Tr. 99-100; 119; 124; 168-169). On each production shift, the operator of the scoop had the duty of bringing in supplies such as roof bolts, timbers, and rock dust during the first part of his shift. After he had completed bringing in supplies, it was the scoop operator's duty to shove excess coal accumulations into the face and to apply rock dust to the floor after the loading machine had completed removal of coal from each working place (Tr. 99-100; 167-169). The chief mine foreman each day leaves a list of duties for the third-shift mine foreman to complete on his shift between midnight and 8:00 a.m. Those duties always include cleaning up excessive coal accumulations and applying rock dust (Tr. 100-101; 119; Exhs. A and B).

12. Three of Pontiki's witnesses agreed that on May 3, 1979, when Order No. 706444 was written, there was an inadequate amount of rock dust on the mine floor (Tr. 110; 164; 174-175). Pontiki's safety director, who had formerly been an MSHA inspector for about 3 years, stated that he agreed that a violation of section 75.403 existed at the time Order No. 706444 was written, but the safety director stated that he disagreed with the inspector's claim that the violation was the result of unwarrantable failure (Tr. 164-165).

13. Pontiki's mine foreman stated that rock dusting on the midnight or maintenance shift is done by a machine and the maintenance shift concentrates on the area which has been mined during the preceding two production shifts (Tr. 99-100). The mine foreman specifically stated: "Honestly, when he dusts the last line of breaks he doesn't concentrate on the floor. Really machine dusting you just can't dust the floor * * *" (Tr. 104). The mine foreman explained that rock dust is applied by hand during the production shift by the scoop operator. Sometimes they get behind with dusting the floor and at such times "* * * we'll work extra hours at dusting the floor" (Tr. 105).

14. Pontiki's third-shift foreman stated that the miners on his maintenance shift did not apply rock dust to the mine floor as well as they should. He stated specifically, "I leave instructions for them to spray the ribs and the top and the bottom. Of course, you know, a lot of times, they don't get maybe to the bottom as good as they should. It should be thicker than what it is, really" (Tr. 123).

15. The inspector issued an unwarrantable failure order because the section foreman knew that inadequate rock dusting had been done, but the foreman was taking no action to apply rock dust although the roof-bolting machine was being operated and the miners were getting ready to produce

coal at the time Order No. 706444 was issued (Tr. 39; 45). The inspector believed that the violation of section 75.403 contributed significantly and substantially to the cause and effect of a safety hazard because the No. 1 Mine releases methane and an explosion could have occurred as a result of the inadequate rock dusting. The inspector believed that management was becoming complacent about the need to apply an adequate amount of rock dust. The inspector did not find that there was sufficient methane in the area at the time the order was written to warrant a finding of imminent danger (Tr. 39-40; 64; 73-80).

16. Order No. 706444 was based on Citation No. 706762 issued April 3, 1979, citing Pontiki for a violation of section 75.313 because "[t]he S and S battery powered scoop (no serial No.) which is used to load and haul coal from the faces on No. 001-0 Section is not equipped with a methane monitor" (Exh. 3). Pontiki had been using the scoop for about 2 weeks without ever having installed a methane monitor on the scoop. If the inspector had found that the scoop had been equipped with a methane monitor which had become inoperable, he would have issued an ordinary citation under section 104(a) of the Act, but he found that Pontiki's use of a scoop for 2 weeks without installing a methane monitor was a sufficient showing of negligence to justify his issuance of the citation under section 104(d)(1) of the Act. The inspector found that the alleged violation of section 75.313 contributed significantly and substantially to the cause or effect of a safety hazard because the No. 1 Mine releases methane and a methane monitor will deenergize equipment if it encounters a concentration of methane of up to 2 percent or more. A concentration of methane of up to 5 percent may cause an ignition. The inspector did not find that an imminent danger existed because the scoop was not being operated in an explosive concentration of methane (Tr. 14-29).

17. In the inspector's opinion, Pontiki's management failed to demonstrate a good faith effort to achieve rapid compliance after he issued Order No. 706444 citing Pontiki for a violation of section 75.403. The inspector based his opinion of lack of good faith abatement on the fact that his order was issued on May 3, 1979, and was not abated until May 7, 1979 (Tr. 40). After the inspector was shown a calendar, he stated that his order was issued on a Thursday at 6:05 p.m. and that an intervening weekend passed before he terminated the order on Monday, May 7, 1979 (Tr. 41). The inspector's opinion as to lack of good faith abatement failed to take into consideration the fact that Pontiki's management tried to get an inspector to return to the mine on Friday, May 4, 1979, to terminate the order, but no MSHA inspector was available for checking the conditions in the No. 5 Section because all of the inspectors were attending a personnel meeting at MSHA's Prestonsburg Office (Tr. 42-43; 115; 187). The inspector did not bring his notes with him when he testified at the hearing and therefore was unable to agree or disagree as to his availability to check the No. 5 Section on May 4, 1979, to determine whether his order should be terminated (Tr. 43). In the opinion of Pontiki's mine foreman, the conditions cited in the inspector's order had been abated by the next day after the order was issued (Tr. 115).

18. When Pontiki's management was unable to obtain an inspector to check the conditions in the No. 5 Section on May 4, 1979, additional cleaning and rock dusting were done during the weekend, but much of that cleaning consisted of removal of loose coal which had sloughed off the ribs and was lying behind the roadway timbers (Tr. 132; 187). The inspector stated that his order was not intended to require the removal of material from behind the timbers (Tr. 67-71). The preponderance of the evidence shows that Pontiki's management demonstrated a good faith effort to achieve rapid compliance.

Docket No. KENT 79-115-R

The Validity of Underlying Citation No. 706762

The first contention made in Pontiki's brief (pp. 24-27) is that underlying Citation No. 706762, on which Order No. 706444 is based, is invalid because it does not contain the finding of unwarrantable failure which is required by section 104(d)(1) of the Act. For all practical purposes, Pontiki is raising the question of whether MSHA Form 7000-3, which is used by inspectors for issuing citations and orders under the 1977 Act, is sufficiently specific to comply with the requirements of section 104(d)(1) when the inspector wishes to issue an unwarrantable failure citation. As Pontiki correctly points out, section 104(d)(1) unambiguously requires that "* * * if he [an authorized representative of the Secretary] finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter."

Exhibit No. 3 in this proceeding is Citation No. 706762 issued by an inspector on April 3, 1979. Citation No. 706762 is written on MSHA Form 7000-3. The inspector placed an "X" in a box at the top of the form to show that he was issuing a citation. Under the word "Citation" there appears in parentheses "See Reverse." If one turns the form over, he reads on the right side of the back of the form the following statement:

> CITATION/ORDER
>
> Pursuant to the Federal Mine Safety and Health Act of 1977, the undersigned Authorized Representative of the Secretary upon making an inspection or an investigation of the hereon designated mine on this date finds/believes that the following condition or practice exists, or has existed, in the mine area or on the equipment described hereon.
>
> Section 104(a) - Violation of the Act, mandatory health or safety standard, rule, order or regulation

Section 104(d)(1)	- Unwarrantable failure - could significantly and substantially contribute to health or safety hazard
Section 104(f)	- Citation - exceeding respirable dust standard

Beneath the word "Citation" on the front of the form, the phrase "Type of Action" appears. The inspector entered after "Type of Action" the numbers and letter "104-D." There is nothing on the front of the form to explain what the entry "104-D" means. If one turns the form over, he will find nothing on the back of the form which explains what "104-D" means, but he will find under the caption "Citation/Order," as quoted above, an explanation opposite "Section 104(d)(1)" to the effect that section 104(d)(1) is associated with "unwarrantable failure."

Beneath the words "Part and Section" on the front of the form, the inspector placed an "X" in a box after which there appears "S and S (See Reverse)." Again, if one turns to the back of the form, he will find opposite "Section 104(d)(1)" a statement indicating that a 104(d)(1) type of action involves a violation which "could significantly and substantially contribute to health or safety hazard."

Pontiki contends that the entries on Exhibit No. 3 or Form 7000-3, as described above, fall short of compliance with section 104(d)(1) of the Act which requires that an inspector shall include a finding of unwarrantable failure "* * * in any citation given to the operator under this chapter."

MSHA's brief (p. 11) notes that the Commission stated in Secretary of Labor v. Jim Walter Resources, Inc., 1 F.M.S.H.R. Comm. Decisions 1827, 1829, that "[t]he primary reasons compelling the statutory mandate of specificity is for the purpose of enabling the operator to be properly advised so that corrections can be made to insure safety and to allow adequate preparations for any potential hearing on the matter." The issue in the Jim Walter case was whether the inspector's description of the "condition or practice" cited in his notice of violation was sufficiently specific to comply with section 104(e) of the Federal Coal Mine Health and Safety Act of 1969, but the principle is the same, namely, whether Exhibit No. 3 sets forth a specific finding as to unwarrantable failure which satisfies the provisions of section 104(d)(1) of the 1977 Act.

I find that Exhibit No. 3 complies with the "finding" requirements of section 104(d)(1). The front of Exhibit No. 3 informed Pontiki that Citation No. 706762 was being issued under section 104(d). Although the inspector did not add subsection (1) after his entry of section "104-D," his omission was not prejudicial to Pontiki because there is no entry on the back of Citation No. 706762 with which the inspector's reference to "104-D" could have been confused. Therefore, the back of Citation No. 706762 specifically stated that the inspector had found the existence of a condition or practice which was described on the front of Citation No. 706762. The front of the citation also advised Pontiki that the citation was being issued under section 104-D and the back of the form clearly shows that any reference to "D" must pertain to section 104(d)(1) which is only associated with unwarrantable failure. The inspector's checking of "S and S" on the front of the citation was associated with a request that the operator examine the "reverse" or back side of the form. There, again, opposite "Section 104(d)(1)," the form explained that "S and S" meant a significant and substantial violation which could contribute to a health or safety standard.

I do not think that Pontiki's brief raises a question about whether the evidence in this proceeding would support a finding that the violation alleged in Citation No. 706762 was the result of unwarrantable failure on the part of Pontiki, but if such an issue is inherent in Pontiki's arguments, I believe that Finding No. 16, _supra_, supports the inspector's finding of unwarrantable failure in Citation No. 706762, assuming that unwarrantable failure has the meaning assigned to that term in _Zeigler Coal Co._, 7 IBMA 280, 295-96 (1977).

MSHA's Request that I Find a Violation of Section 75.313

At the hearing, I sustained an objection by Pontiki's counsel when MSHA's counsel asked the inspector whether Pontiki had demonstrated a good faith effort to achieve compliance after Citation No. 706762 was issued. I sustained the objection because my order had consolidated for hearing in this proceeding only the civil penalty issues pertaining to Order No. 706444. Since Pontiki's counsel had claimed that the underlying Citation No. 706762 was invalid only for failure to make the findings required by section 104(d)(1) of the Act, it did not occur to me that I should consolidate the civil penalty issues with respect to underlying Citation No. 706762 with the civil penalty issues pertaining to Order No. 706444.

In the preceding portion of this decision I have rejected Pontiki's argument that Citation No. 706762 failed to make the findings required by section 104(d)(1). Since Pontiki was not given notice that the civil penalty issues with respect to Citation No. 706762 would be considered at the hearing, I think that I must reaffirm my sustaining of Pontiki's objection to my considering in this proceeding the civil penalty issues with respect to Citation No. 706762.

It is true that MSHA's brief (p. 7) argues that I may find a violation of section 75.313 on the basis of the evidence introduced by MSHA in this proceeding regardless of whether Pontiki was given notice that the civil penalty issues with respect to Citation No. 706762 would be considered at the hearing. MSHA's theory is that I may determine whether the violation of section 75.313 alleged in Citation No. 706762 occurred as a part of my consideration of Pontiki's arguments that Citation No. 706762 is invalid for failure to make the findings required by section 104(d)(1) because MSHA claims that one of the findings required by section 104(d)(1) is that the inspector find that a violation has occurred. While that may be true, it is a fact that Pontiki did not raise the specific issue of whether a violation of section 75.313 occurred. Pontiki's objection to the underlying citation has always been directed to the question of whether the citation properly made the finding as to unwarrantable failure which is required by section 104(d)(1).

In any event, it is a fact that my order did not consolidate for hearing in this proceeding the civil penalty issues associated with Citation No. 706762. The sole reason that MSHA requests me to find that a violation of section 75.313 occurred is to make my finding "res judicata" for the prospective civil penalty proceeding (MSHA's brief, p. 7). I do not believe I can ignore the clear provisions of my order providing for hearing and consider issues which my order failed to state would be considered.

As I stated at the hearing, it was an oversight on my part not to have consolidated for hearing the civil penalty issues pertaining to Citation No. 706762. It has been my consistent practice to consolidate for hearing all civil penalty issues with the issues relating to the primary order or citation involved in proceedings initiated by applications for review or notices of contest, but this is the first proceeding I have had in which MSHA wished to have me consider the civil penalty issues associated with an underlying citation. It would be unfortunate if my lack of foresight in consolidating the civil penalty issues pertaining to Citation No. 706762 for hearing in this proceeding should result in the necessity of my having to hold a further hearing on the civil penalty issues raised by MSHA's Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-53 with respect to underlying Citation No. 706762. As explained below, I do not think that an additional hearing should be required to resolve the civil penalty issues remaining to be determined with respect to Citation No. 706762.

Although the order accompanying this decision disposes only of the civil penalty issues raised by Order No. 706444, it is my opinion that this record contains the essential facts required for determining all civil penalty issues with respect to Citation No. 706762, provided counsel for the parties are agreeable to a resolution of the civil penalty issues on the basis of the record in this proceeding. The fact that evidence has been received with respect to Citation No. 706762 should not, of course, preclude the parties from settling the civil penalty issues raised with respect to Citation No. 706762, if they should be inclined to do so.

I shall take no action in scheduling a hearing or deciding the civil penalty issues with respect to Citation No. 706762 until time for filing a request for discretionary review of my decision has expired. Within a reasonable time after review has either been granted or denied, counsel for the parties should advise me as to their wishes concerning the manner for disposition of the civil penalty issues. If I do not eventually receive an expression of opinion from counsel for the parties as to the method they would prefer for disposing of the civil penalty issues raised by Citation No. 706762, I shall schedule those issues for hearing.

The Validity of Order No. 706444

The first argument in Pontiki's brief (p. 28) with respect to the invalidity of Order No. 706444 is that the order must fall because it was based on Citation No. 706762 which has been shown by Pontiki to be invalid. Since I have already held in a preceding portion of this decision that Citation No. 706762 was validly issued, I must necessarily reject Pontiki's first argument.

The second argument raised by Pontiki's brief (pp. 28-29) "* * * is substantially identical to that made with respect to the underlying citation," namely, that Order No. 706444 is invalid because it failed to make the special findings which are required by the remainder of section 104(d)(1) which provides:

> * * * If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order [of withdrawal] * * *.

Since Pontiki's argument with respect to the invalidity of Order No. 706444 is substantially identical to that made with respect to underlying Citation No. 706762, my determination as to the validity of Order No. 706444 will also be nearly identical to that made with respect to Citation No. 706762. Order No. 706444 was received in evidence as Exhibit No. 5. Form 7000-3 used by the inspector in this instance for issuance of Order No. 706444 is, of course, identical to the form used for issuance of Citation No. 706762 except that the inspector correctly cited the type of action as "104(d)(1)" and checked the block at the top of the form indicating that he was issuing an order of withdrawal. When Exhibit No. 5 is examined on its reverse side in response to the suggestion on the front of the form to "See reverse," the following statement will be found on the left side of the back of the form:

> ORDER
>
> You are hereby ordered to cause immediately all persons, except those permitted under Section 103(j), 103(k) and/or 104(c) of the Federal Mine Safety and Health Act of 1977, to be withdrawn from, and to be prohibited from, entering the area of the mine described hereon until an Authorized Representative of the Secretary determines that the danger(s) and its causes no longer exist, the violation(s) of the mandatory health or safety standards have been abated or the emergency has been eliminated.

Section 104(b) - Failure to abate a violation 104(a) or (d)(1) in the time period given

Section 104(d)(1) - Unwarrantable failure - subsequent to 104(d)(1) citation during the same inspection or within 90 days after issuance of 104(d)(1) citation

Section 104(d)(2) - Unwarrantable failure violation - subsequent to issuance to 104(d)(1) order - subsequent inspection - no intervening inspection of the mine in its entirety which has disclosed no further unwarrantable violation

* * * * * * * * *

An examination of Exhibit No. 5 shows that the inspector checked that an order of withdrawal was being issued under section 104(d)(1) of the Act and the reverse side of Exhibit No. 5 explained to Pontiki that the order involved a finding that the violation was the result of unwarrantable failure found during the same inspection or within 90 days after the issuance of Citation No. 706762. Exhibit No. 5 clearly made all the preliminary findings which are required to comply with the provisions of section 104(d)(1) of the Act insofar as they pertain to the issuance of an order. Although the former Board of Mine Operations Appeals has held that the violation cited in an order issued under section 104(c)(1) of the 1969 Act does not have to be a violation which would significantly and substantially contribute to the cause or effect of a health or safety standard (*Zeigler Coal Co.*, 6 IBMA 182 (1976); *Old Ben Coal Co.*, 6 IBMA 229 (1976); *Old Ben Coal Co.*, 6 IBMA 234 (1976); *Old Ben Coal Co.*, 7 IBMA 224 (1976); and *Alabama By-Products Corp.*, 7 IBMA 85 (1976)), the inspector checked the "S and S" block on Order No. 706444 because he believed the violation of section 75.403 cited in the order was a significant and substantial violation which could significantly and substantially contribute to the cause and effect of a health or safety standard (Finding No. 15, *supra*).

Based on the examination of Order No. 706444 set forth above, I find that the order contained the special findings required by section 104(d)(1) of the Act and was therefore a valid order.

The third argument made in Pontiki's brief (pp. 29-31) is that the violation of section 75.403 cited in Order No. 706444 was not proven. As indicated in Finding No. 5, *supra*, Order No. 706444 cited Pontiki for having inadequate rock dust in all seven entries and connecting crosscuts in the No. 5 Section of the mine. Pontiki points to the fact that the inspector's order of termination stated that loose coal and coal dust were removed from the No. 5 Section and that entries Nos. 1 through 7 and connecting crosscuts were adequately rock dusted. Pontiki then refers to its own witnesses' testimony to the effect that there were loose coal accumulations in the No. 5

Section and concludes from such evidence that since there was a violation of section 75.400 in the No. 5 Section, the inspector incorrectly cited Pontiki for a violation of section 75.403.

One of the difficulties I have with Pontiki's argument that the existence of a violation of section 75.400 precludes an inspector from citing Pontiki for a violation of section 75.403, is the fact that three of Pontiki's own witnesses, including one who had previously been an MSHA inspector for 3 years, stated unequivocally that there was inadequate rock dust on the floor in the No. 5 Section (Finding No. 12, supra). Obviously, the inspector could have cited Pontiki for a violation of section 75.400 in the same order in which he cited Pontiki for a violation of section 75.403. Thus, it is quite immaterial that the floor in the No. 5 Section contained loose coal accumulations so long as the evidence also showed that Pontiki had failed to apply an adequate amount of rock dust to the floors as required by section 75.403.

Section 75.403 provides as follows:

> Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall not be less than 65 per centum [in intake entries] * * *. [Emphasis supplied.]

All the entries in which the inspector obtained a total of three samples were in intake air and two samples, when analyzed, showed an incombustible content of 35 percent and one sample had an incombustible content of 31 percent. The inspector's order cited a lack of rock dust in only those areas where rock dusting is required, that is, the areas were more than 40 feet from the working face, they were not too wet or too high in incombustible content to propagate an explosion, they were not inaccessible or unsafe to enter, and they had not been exempted from rock dusting by the Secretary (Tr. 93-94). Inasmuch as section 75.403 requires that an adequate amount of rock dust be "maintained" in the entries and crosscuts cited in Order No. 706444, Pontiki was not exempt from having the entries and crosscuts rock dusted just because its witnesses testified that an excessive amount of loose coal and coal dust had been permitted to accumulate. Pontiki was required by section 75.400 to keep the loose coal cleaned up and was also required by section 75.403 to apply sufficient rock dust to maintain the incombustible content at 65 percent in intake entries. The inspector believed the loose coal accumulations of about 1 inch were sufficiently thin that the area could be rendered 65 percent incombustible by application of rock dust alone without any cleaning (Finding Nos. 8 and 18, supra). If he had also believed that the loose coal needed to be cleaned up before rock dust could be applied, he could have cited Pontiki for a violation of section 75.400 and also for a violation of section 75.403. The fact that the inspector elected to cite Pontiki for only one violation instead of two does not make his order invalid for failing to cite both violations.

Perhaps the most unsatisfactory aspect of the evidence presented by MSHA to prove that a violation of section 75.403 existed is the question of whether the inspector's three samples were really representative of the conditions which existed throughout the seven entries and connecting crosscuts cited in the inspector's order (Pontiki's Brief, p. 31). The evidence unequivocally shows that all three samples were taken within the second crosscut from the face, or within a few feet of that crosscut in the Nos. 2 and 3 entries. Thus, the samples proved that the floor in the second crosscut from the face had an incombustibility of from 31 to 35 percent (Finding No. 7, supra). The inspector believed that those three samples were representative of conditions throughout all seven entries and connecting crosscuts, but his credibility would have been considerably enhanced if he had taken his samples farther apart than he did.

The inspector's testimony was, however, corroborated by the testimony of Pontiki's safety director who had been an MSHA inspector for about 3 years before he began working for Pontiki. The safety director was traveling with the inspector when the inspector stated that he was going to issue a "(d)" order citing Pontiki for a violation of section 75.403. Pontiki's safety director candidly stated that he agreed that Pontiki had violated section 75.403 (Finding No. 12, supra). Pontiki's safety director was of the opinion that the inspector should have taken additional samples and that the violation was not the result of unwarrantable failure, but he readily agreed that a violation of section 75.403 had occurred. Additionally, two of Pontiki's foremen stated that an inadequate amount of rock dust had been applied to the mine floor and they specifically stated that the machine duster used on the maintenance shift did not apply as much rock dust to the floor of the mine as was desirable (Finding Nos. 13 and 14, supra). Therefore, I find that the preponderance of the evidence shows that a violation of section 75.403 occurred as cited in Order No. 706444 (Finding Nos. 3 through 9 and 12 through 14, supra).

The fourth argument made in Pontiki's brief (pp. 32-39) is that, assuming, arguendo, that a violation of section 75.403 occurred, the violation was not the result of an unwarrantable failure by Pontiki's management. Many of the factual arguments advanced by Pontiki in support of its argument that MSHA failed to prove that the violation was the result of unwarrantable failure have been answered in my discussion above of the issue as to whether a violation of section 75.403 was proven. I agree that Pontiki's brief correctly cites the language from the former Board's Zeigler opinion for the correct definition of the words "unwarrantable failure," namely (7 IBMA at 295-96):

> * * * an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care. [Emphasis supplied.]

Pontiki's brief also correctly quotes one of the inspector's answers in response to questioning done to elicit from the inspector his understanding of the words "unwarrantable failure" (Br., p. 32 and Tr. 27):

> Unwarrantable failure on the part of an operator is a violation of a law where a condition exists at the mines which could add substantially and significantly to the health and safety of the miners. The operator knows the condition exists and yet is doing nothing to correct it. Or it can be a condition that exists where the operator knows or through diligent effort should have known the condition existed yet he was doing nothing to correct it. This is what I consider unwarrantable; it's a condition the operator knows exists.

Inasmuch as the inspector practically quoted one of the definitions of unwarrantable failure given in the Board's Zeigler opinion, supra, it is difficult to determine any defects in the inspector's rationale for finding that the violation cited in his order was the result of an unwarrantable failure to comply. Pontiki, therefore, resorts to language in the Zeigler opinion in which the Board indicated that the inspector's judgment that unwarrantable failure existed must be based on a thorough investigation and must be reasonable in light of the peculiar relevant facts and circumstances which existed at the time the inspector writes an unwarrantable failure order. Pontiki argues that the inspector's finding of unwarrantable failure was not based on a thorough investigation or reasonable conclusions because he did not walk the complete length of all the entries and connecting crosscuts cited in his order and because he did not inquire about the efforts which Pontiki's management was making to maintain an adequate coating of rock dust in the No. 5 Section (Br., pp. 34-36).

Although the inspector did not walk the entire length of each of the entries cited in his order (Finding No. 6, supra), he did inspect the face area, including walking through the last open crosscut and the second open crosscut from the face. He did walk back to the feeder and he did look down each of the entries. While he may not have been able to see a total distance of 360 feet with great precision while having only his cap light for illumination, it is quite probable that he could distinguish between the blackness of the floor and the whiteness of the roof and ribs for a distance of 360 feet. His order was primarily based on what he saw in the last two crosscuts and the fact that the floor appeared black everywhere he looked. Therefore, his testimony that he could see for a distance of 360 feet for the purpose of determining the condition of the floor is a credible statement.

It should be recalled that the inspector entered the mine about 4:15 p.m. or shortly after the second shift went to work at 4:00 p.m. (Tr. 136). The inspector issued his unwarrantable failure order at 6:05 p.m. after an examination of the No. 5 Section which had lasted about 1-1/2 hours. Pontiki's safety director testified that 190 shuttle cars of coal had been produced in the No. 5 Section during the day shift which had ended just a few minutes before the inspector began his examination of the No. 5 Section (Tr. 142). I have never had a case in which anyone estimated the amount of coal hauled by shuttle cars to be less than 5 tons, and most of the time, the tonnage is estimated at 8 tons. Since all witnesses agreed that the shuttle cars in the No. 5 Section had been loaded so high that coal spilled off of them on the way to the feeder, it is likely that the 190 shuttle cars produced on the No. 5 Section during a single shift were hauling 8 tons each. In any event, the cars would have hauled from 950 tons (190 x 5) to 1,520 tons (190 x 8). The four producing sections in the No. 5 Mine produce a total of about 3,500 tons of raw coal per day. Therefore, the production of about 1,000 tons of coal during a single shift on a single section was a remarkable achievement. Moreover, even if the 190 cars only hauled 1 ton of coal each, just the process of loading and unloading 190 cars within an 8-hour period was a phenomenal accomplishment.

Pontiki's brief emphasizes that management had a very fine program for cleaning and rock dusting in the No. 1 Mine (Finding No. 11, supra). All three of Pontiki's foremen testified, however, that they were having a great many roof-control problems in the No. 5 Section and that much of their time was being spent in installing supplemental roof support in addition to the normal roof-bolting configuration. They further stated that when both a need for supporting the roof and a need for rock dusting occurred simultaneously, they gave priority to supporting the roof (Finding No. 10, supra). Three of Pontiki's witnesses also testified that they were not applying as much rock dust to the floor as was desirable (Finding No. 13, supra). Pontiki's chief foreman, in describing their difficulties in keeping the floor cleaned and rock dusted in the No. 5 Section, stated (Tr. 105):

> Well, what I seen was just the ribs rolling off. And, well, the seam of coal was I guess all across the face from seven to nine feet and when a piece would tumble off it would almost close the roadway, if you know what I mean. Sometimes it would fall twenty foot long and clear across the road, but we had all kinds of trouble with that. We done everything I could and I guess just failed, that's all.

It is easy to understand why Pontiki's management thought that the inspector's finding of unwarrantable failure was unfair. The record shows that management had procedures which should have assured that the roof in the No. 5 Section was controlled and that the section was properly cleaned and rock dusted (Findings Nos. 10 and 11, supra). Nevertheless, in my opinion, there was at least one defect in management's plan, namely, an unreasonable and excessive reliance was placed on the ability of the operators of the scoop to bring in supplies, clean up excess coal, and apply rock dust to the floor during the production shifts. It was the duty of the scoop operator to bring in roof bolts, rock dust, and other supplies at the beginning of each shift. After he had finished bringing in supplies, it was his duty to clean up loose coal accumulations and apply rock dust to the floor by hand. The maintenance shift, which worked from midnight to 8 a.m., was responsible for machine dusting the roof, ribs, and floor. While they were supposed to apply rock dust to the floor, they did not apply as much as was desirable (Finding Nos. 12 and 13, supra).

Since management was having difficulty in supporting the roof and since extra time was needed to maintain the roof, the evidence clearly supports a finding that management was not giving as much attention to cleaning and rock dusting as was required in the circumstances. In every instance, it was the scoop operator's duty to clean and rock dust after he had completed bringing in supplies. In other words, Pontiki's management was placing primary emphasis on producing coal rather than in maintaining a completely safe operation. At the beginning of the shift on which the inspector's order was issued, one of Pontiki's shift foremen had made an inspection of the section before the inspector arrived and he had concluded that the section needed cleaning and rock dusting (Tr. 175). Despite the fact that management knew an inadequate amount of rock dust was being applied to the floor and that excessive coal needed to be cleaned up, management was continuing to produce 190 shuttle cars of coal per shift, instead of stopping production long enough to clean up the section and apply an adequate amount of rock dust. It makes very little difference if miners are protected from having the roof fall on them if, while standing under a perfectly safe roof, they are killed or injured by a coal dust explosion.

A preponderance of the evidence supports the inspector's finding that management knew an inadequate amount of rock dust had been applied and yet management was not making sure that the section was cleaned and rock dusted as required by section 75.403. Therefore, I find that the inspector properly found that the violation of section 75.403 cited in Order No. 706444 was the result of unwarrantable failure. Since Order No. 706444 has successfully withstood all of Pontiki's arguments, the order accompanying this decision will hereinafter affirm Order No. 706444.

Docket No. KENT 80-53

MSHA's Proposal for Assessment of Civil Penalty was filed on January 15, 1980, seeking assessment of civil penalties for the violations of sections 75.313 and 75.403 alleged in Citation No. 706762 and Order No. 706444, respectively. As I have already explained on page 10 of this decision, supra, my order setting this case for hearing did not consolidate the civil penalty issues raised with respect to underlying Citation No. 706762. Therefore, my decision in this proceeding will deal only with the civil penalty issues concerning Order No. 706444.

I have hereinbefore found that the violation of section 75.403 alleged in Order No. 706444 occurred. I shall hereinafter consider the six criteria set forth in section 110(i) of the Act so that an appropriate civil penalty may be assessed for the violation of section 75.403 cited in Order No. 706444.

Size of Respondent's Business

On the basis of Finding No. 1, supra, I find that Pontiki is a large operator and that the civil penalty to be assessed in this proceeding should be in an upper range of magnitude insofar as it is determined under the criterion of the size of respondent's business.

Effect of Penalties on Operator's Ability To Continue in Business

Pontiki's counsel did not present any evidence at the hearing with respect to Pontiki's financial condition. In Buffalo Mining Co., 2 IBMA 226 (1973), and in Associated Drilling, Inc., 3 IBMA 164 (1974), the former Board of Mine Operations Appeals held that when a respondent fails to present any evidence concerning its financial condition, a judge may presume that payment of penalties would not cause respondent to discontinue in business. In the absence of any specific evidence to the contrary, I find that payment of penalties will not cause Pontiki to discontinue in business.

Good Faith Effort To Achieve Rapid Compliance

On the basis of Finding Nos. 17 and 18, supra, I find that Pontiki demonstrated a good faith effort to achieve compliance and Pontiki will be given full credit for that mitigating factor in the assessment of a civil penalty.

History of Previous Violations

At the hearing, MSHA's counsel introduced as Exhibit No. 2 a 53-page computer printout which lists previous violations at all the mines controlled by Mapco, Inc. (Finding No. 1, supra). I stated at the hearing that it has been my practice to consider only the history of previous violations of the individual mine in which a given violation is found to have occurred (Tr. 7). MSHA's brief (pp. 3 and 24-25) argues that I am obligated to consider Mapco, Inc.'s, total history of previous violations rather than the previous violations which have occurred only at Pontiki's No. 1 Mine where the violation of section 75.403 here involved occurred. MSHA's argument is primarily based on a claim that section 110(i) of the Act provides for consideration to be given to "* * * the operator's history of previous violations," rather than for consideration to be given to the history of previous violations which have occurred at a single mine. MSHA contends that a greater deterrent against continued violations will be achieved if top management is held responsible for all of its subsidiaries' history than will be achieved if only a single mine is considered at a given time.

I do not have a closed mind on the subject. There may be cases in which it would be beneficial to consider the controlling company's history of previous violations rather than to consider only the previous violations which have occurred at the mine under consideration for a specific violation. In each proceeding, a judge must use the evidence which the parties have presented. If the evidence concerning the controlling company's previous violations is limited, there is no way for the judge to show how he has considered a given respondent's history of previous violations.

In this proceeding, for example, Exhibit No. 2 indicates that Mapco, Inc., which controls Pontiki and four other coal companies, has a history of previous violations totaling 2,089 violations. The fact that Mapco's subsidiaries have violated various regulations on 2,089 occasions, by itself, means nothing. That figure does not reveal whether Mapco's violations are greater or less than the violations committed by other controlling companies of comparable size. Exhibit No. 2 does not indicate how many tons of coal are produced in the nine mines which are controlled by Mapco. Exhibit No. 2 does not reveal how many sections of each mine are engaged in production. Exhibit No. 2 does not show how many production shifts exist at each mine nor how many employees work at each mine.

The absence of statistical information prevents me from giving any meaningful consideration to Mapco's previous violations as a whole. For example, Exhibit No. 2 shows that Pontiki's No. 1 Mine has had 15 previous violations of section 75.403 over a period of 3 years, whereas the Retiki Mine of Webster Coal Company has had 14 previous violations of section 75.403 over a period of 5 years, and the Dotiki Mine of Webster Coal Company has had 11 previous violations of section 75.403 over a period of 6 years. The foregoing comparison would make it appear that Pontiki's previous violations are more adverse than those of its affiliated company, but I cannot make such a finding because I do not know how many sections produce coal in either the Retiki Mine or the Dotiki Mine. If those mines employ fewer miners and produce less coal than Pontiki's No. 1 Mine, their record of 14 and 11 previous violations of section 75.403 would be more significant and unfavorable than Pontiki's 15 previous violations of section 75.403.

In short, until MSHA is able to introduce data of a more meaningful nature than those provided in Exhibit No. 2, there is no way for me to show how I have actually considered the criterion of history of previous violations with respect to a given controlling company's total history of previous violations. Moreover, I believe that top management will be as much deterred from allowing future violations to occur by a penalty assessed specifically for a given mine's adverse history of previous violations as it would be deterred by a penalty assessed for its overall adverse history of previous violations. Management would recognize from having to pay a civil penalty so determined that action taken by it to reduce or eliminate future repetitious violations at all mines would be likely to reduce any civil penalties that might result from any subsequent violations.

As to the history of previous violations at Pontiki's No. 1 Mine, Exhibit No. 2 shows that there were two violations of section 75.403 in 1977, 12 in 1978, and one in 1979 by January 4, 1979. I find that 12 violations of section 75.403 during a single year shows a very unfavorable history of previous violations. Therefore, the penalty hereinafter assessed will be increased by $500 under the criterion of history of previous violations. That large a number of violations of section 75.403 tends to support the inspector's belief that Pontiki's management was becoming complacent about the need to maintain an adequate amount of rock dust to within 40 feet of the working faces (Tr. 39).

Negligence

The preponderance of the evidence shows that there was a high degree of negligence in respondent's violation of section 75.403. Management was producing coal at the rate of 190 shuttle cars per shift despite the fact that a greater amount of time and effort than normal was being exerted in controlling the roof. The effort to maintain a high productivity from the No. 5 Section, despite the roof-control problem, caused Pontiki's management to slight the need to exert as great an effort at cleaning and rock dusting as was being utilized to control the roof. Management's failure to keep the section clean and maintain an adequate amount of rock dust was the result of a considerable amount of indifference to adherence with section 75.403. The criterion of negligence requires that a penalty of $2,000 be assessed (Finding Nos. 5, 7, 10, and 12 through 15, supra).

Gravity

Inasmuch as Pontiki's No. 1 Mine liberates about 454,000 cubic feet of methane in a 24-hour period (Finding No. 1, supra), the failure to maintain an adequate amount of rock dust exposed the miners to a serious threat of an explosion. At the time the inspector cited the violation of section 75.403, he found that no dangerous amount of methane was present. Nevertheless, there was a potential for an explosion because the roof-bolting machine was being operated and respondent's shift foreman had just inspected the No. 5 Section and had recognized that the section was badly in need of cleaning and had directed that cleaning be done as soon as possible. The section foreman, however, had made no attempt to clean up or rock dust and no cleaning had been commenced up to the time that the inspector issued Order No. 706444. In such circumstances, the miners had been exposed to a potential ignition for a considerable period of time and the lack of rock dust was necessarily a serious violation. Therefore, I find that a penalty of $1,000 is required under the criterion of gravity (Finding No. 15, supra).

A total penalty of $3,500 will hereinafter be assessed based on my findings above that $500 be attributed to Pontiki's history of previous violations, that $2,000 be attributed to Pontiki's negligence and that $1,000 be attributed to the gravity of the violation. The penalty would have been larger than $3,500 if Pontiki had failed to demonstrate a good faith effort to achieve rapid compliance. The penalty would have been less than $3,500 if Pontiki were not a large operator and if the evidence in this proceeding had shown that Pontiki's ability to continue in business would be adversely affected by having to pay civil penalties.

Ultimate Findings and Conclusions

(1) Pontiki's application for review or notice of contest of Order No. 706444 dated May 3, 1979, should be denied and Order No. 706444 should be affirmed as having correctly cited a violation of section 75.403 and having properly found that the violation was the result of unwarrantable failure under section 104(d)(1) of the Act.

(2) Underlying Citation No. 706762 issued April 3, 1979, and Order No. 706444 properly made the findings required by section 104(d)(1) of the Act and were validly issued.

(3) MSHA's Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-53 should be granted to the extent that it seeks assessment of a civil penalty for the violation of section 75.403 alleged in Order No. 706444 and a civil penalty of $3,500.00 should be assessed for that violation.

(4) The portion of MSHA's Proposal for Assessment of Civil Penalty which seeks assessment of a civil penalty for a violation of section 75.403 with respect to Order No. 706444 should be severed from the remainder of that Proposal and should be disposed of as provided for in paragraph 3 above. The remaining portion of MSHA's Proposal for Assessment of Civil Penalty in Docket No. KENT 80-53 which seeks assessment of a civil penalty for the violation of section 75.313 alleged in Citation No. 706762 should be scheduled for a hearing or should be decided on the basis of the record already made in this proceeding, depending upon the requests which are hereafter received from the parties to the proceeding in Docket No. KENT 80-53.

(5) Pontiki Coal Corporation is subject to the provisions of the Act and to the regulations promulgated thereunder (Tr. 96).

WHEREFORE, it is ordered:

(A) Pontiki Coal Corporation's application for review or notice of contest filed in Docket No. KENT 79-115-R is denied and Order No. 706444 issued May 3, 1979, is affirmed.

(B) MSHA's Proposal for Assessment of Civil Penalty filed in Docket No. KENT 80-53 is severed from the remainder of the Proposal and is granted to the extent specified in paragraph (3) above. Pontiki Coal Corporation is ordered, within 30 days from the date of this decision, to pay a civil penalty of $3,500.00 for the violation of section 75.403 cited in Order No. 706444.

(C) MSHA's Proposal for Assessment of Civil Penalty, insofar as it seeks assessment of a civil penalty for the violation of section 75.313 alleged in Citation No. 706762 will be disposed of as provided for in paragraph (4) above.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 12 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. HOPE 78-744-P A.C. No. 46-03467-02070
v.	:	
SEWELL COAL COMPANY, Respondent	:	Meadow River No. 1 Mine

DECISION

Appearances: Edward H. Fitch, Esq., Office of the Solicitor, Department of Labor, for Petitioner;
C. Lynch Christian III, Esq., Jackson, Kelly, Holt and O'Farrell, Charleston, West Virginia, and Gary W. Callahan, Esq., Lebanon, Virginia, for Respondent.

Before: Judge Lasher

This proceeding arises under section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 *et seq.* (1970), hereinafter the Act. 1/ Under section 301(c)(3) of the Federal Mine Safety and Health Act of 1977, 2/ proceedings such as this which were pending at the time the 1977 Act took effect are to be continued before the Federal Mine Safety and Health Review Commission.

STIPULATIONS

The parties entered the following stipulations:

1/ Section 109(a)I1) states, in part, as follows:

"The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, except the provisions of Title 4, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense * * *."

2/ 83 Stat. 742, 30 U.S.C. § 801 *et seq.*

1. Notices of Violation 2 HSG (8-0004) issued February 12, 1978, and 1 HSG (8-0005) issued February 14, 1978, are the subjects of this proceeding (Tr. 5). 3/

2. The presiding judge has jurisdiction in this matter.

3. Sewell Coal Company, a subsidiary of the Pittston Company, is the operator of the Meadow River No. 1 Mine located at Lookout, Fayette County, West Virginia (Tr. 5). The Meadow River No. 1 Mine was, at the time of the issuance of the two notices, subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969, and the regulations promulgated thereunder (Tr. 5-6). The Meadow River No. 1 Mine is subject to the provisions of the Act and the regulations promulgated thereunder (Tr. 6).

4. Respondent is a large operator (Tr. 6). 4/

5. At the time the notices of violation were issued, Respondent's union employees, members of the United Mine Workers of America, were on strike. This strike began on December 6, 1977, and continued until March 17, 1978 (Tr. 6).

6. The UMWA employees had been on strike for over 2 months prior to the issuance of the notices of violation (Tr. 6).

7. Homer S. Grose was a duly authorized representative of the Secretary at all times relevant to the issuance of Notices of Violation Nos. 2 HSG and 1 HSG. True and correct copies of the notices of violation were served on Respondent (Tr. 6).

8. At approximately 9:50 a.m. on February 13, 1978, Inspector Grose issued Notice of Violation No. 2 HSG to Sewell for an alleged violation of 30 CFR § 75.1704. The condition or practice alleged was Respondent's failure to maintain a designated intake escapeway to insure passage at all times of any person, including disabled persons. The alleged impediment to

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3/ Notice No. 2 HSG (8-0004) alleges that Respondent violated 30 CFR 75.1704 by failing to maintain a designated intake escapeway to insure the passage of any person at all times, because of water ranging from 0 to 16 inches in depth. Notice No. 1 HSG (8-0005), alleges that Sewell violated 30 CFR 75.200 because of the occurrence of fractured and loose roof in the No. 1 section above the No. 1 entry roadway just inby the last open crosscut and extending inby approximately 30 feet.

4/ At the time pertinent herein, Sewell's payroll was 203 underground employees (which figure includes supervisory personnel). During the strike only 33 supervisory personnel worked (Tr. 85-86). Approximately 15 worked on the day shift, 10 on the second shift, and 8 on the third shift. Other personnel could not be hired because of the economic strike (Tr. 111-113, 124) which was in progress at the time.

travel was a water accumulation from 0 to 16 inches in depth for about 40 feet in the designated escapeway (Tr. 6-7).

9. At approximately 9:30 a.m., on February 14, 1978, Inspector Grose issued Notice of Violation No. 1 HSG to Respondent for an alleged violation of 30 CFR § 75.200. The condition alleged was fractured and loose roof in the No. 1 section above the No. 1 entry roadway just inby the last open crosscut and extending in toward the face approximately 30 feet. The roof was a shale material with loose rocks between the resin roof bolts, some of which had allegedly fallen in this area (Tr. 7).

10. The conditions cited in Notices of Violation Nos. 1 HSG and 2 HSG did exist (Tr. 7).

11. Respondent demonstrated good faith in abating Notices of Violation Nos. 1 HSG and 2 HSG and both notices were subsequently terminated (Tr. 7).

12. For the purposes of this proceeding, the Meadow River No. 1 Mine has a moderate history of previous violations (Tr. 7).

Although not by stipulation, Respondent concedes that payment of penalties for the two alleged violations would not interfere with its ability to continue in business (Tr. 48).

FINDINGS OF FACT

Sewell's Meadow River No. 1 Mine is a six-section coal mine entered by two shafts and one slope (Tr. 26). Mining is performed in the Sewell seam of coal and the Sewell Meadow River No. 1 Mine has approximately 25 miles of entries in such seam (Tr. 83). The entries are approximately 20 feet wide and 4-1/2 feet high (Tr. 24, 83), and are connected to adjacent entries by crosscuts (Tr. 82-83; R-1) which provide ventilation for the entries (Tr. 82). The roof above the coal seam is of a glassy shale type which is subject to fracture (Tr. 53, 84). The floor of the mine is undulating (dips up and down) and the mine itself is very "wet" in that it accumulates 500,000 gallons per day (Tr. 24, 84, 85).

Inspector Grose and his fellow inspectors were instructed to conduct inspections of all the coal mines within the jurisdiction of their field office for the purpose of finding violations and hazardous conditions so that the operators would give "priority in eliminating these from the mines as soon as the miners return to work" after the strike (Tr. 21, 22). 5/

5/ Inspector Grose testified:

"During the strike period, the abatement process is more liberal. We do not try to force management personnel to do manual labor and labor related activities in the mines. We give them an extended period of time. In some instances, if the original time as set expires before the work force returns, there are extensions given extending the time 'til the workforce does

An accumulation of water on the floor of an escapeway "forty feet long" and "zero to 16 inches" deep led Inspector Grose to issue Notice No. 2 HSG (8-0004) Tr. 24, 31). Inspector Grose admitted that this was not a "particularly serious" condition (Tr. 30) and that "* * * the mine deteriorates a little more rapidly during work stoppages" (Tr. 34).

Slips and cracks in the mine roof, fallen rock, and rock which was ready to fall led the inspector to issue Notice No. 1 HSG (8-0005) (Tr. 37). This was a serious condition which could have caused a fatality or serious injury (Tr. 37).

During the strike period (see Stipulation #5, supra), MSHA (MESA) inspectors were instructed to be more liberal with respect to granting abatement time and to help the mine operator find hazardous conditions during the strike since the operator has "fewer personnel and only management personnel" employed (Tr. 21-23, 52-54, 56, 57). The inspectors were also instructed not "to insist on management complying with" abating violations since this would be an interference with labor and management and would force management to perform manual labor (Tr. 21, 22, 57). Inspector Grose thought the strike would be over by the time he set for abatement (Tr. 58).

During a strike, a mine deteriorates rapidly because it does not get attention to minor problems since there are insufficient personnel to perform the repairs (Tr. 90, 92). The conditions cited in the two notices of violation were the result of natural deterioration in the mine (Tr. 91-93, 119) and there were an insufficient number of personnel at the mine to accomplish the elimination of such conditions during the strike (Tr. 91, 111-113, 120).

The mine was not sealed by Respondent during the strike because flooding and massive roof falls would probably occur, equipment would deteriorate, and a permit for reopening the mine might have taken a year because of changing legal requirements (Tr. 525, 526).

During the strike no coal production was undertaken (Tr. 90). The supervisory personnel who worked were occupied in "fixing up hazard conditions," such as rock dusting and pumping, and also timbering and ventilation work (Tr. 90-91). There were not sufficient supervisory personnel available during the strike to eliminate all the conditions which occurred in the mine

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fn. 5 (continued)
return." Respondent was given 14 days to abate the two notices involved. Abatement of both, however, was accomplished within 2 days. The two notices were issued during MESA's first inspection of the mine during the strike-after the strike had been in progress approximately 2 months (Tr. 36).

as a result of natural deterioration which might constitute violations (Tr. 85, 96, 90, 91, 93, 102). 6/

The supervisors conducted preshift examinations only of the areas where they were assigned to work on a given day during the strike (Tr. 87, 106). Mine management followed the practice of correcting the most serious conditions first (Tr. 110, 127).

DISCUSSION, ULTIMATE FINDINGS AND CONCLUSIONS

Petitioner, MSHA, maintains that its policy was not to force management into performing manual labor during the strike. 7/ Yet, it did issue notices of violation during the strike and in this proceeding seeks a penalty. 8/ Respondent concedes the existence of the violative conditions (see Stipulation No. 10, supra), but contends it was impossible to prevent such violations during the strike because of insufficient personnel.

Impossibility of compliance became established in mine safety law as an affirmative defense to charges of mine safety violations by the Interior Department's Board of Mine Operations Appeals in its decision in Itmann Coal Company, 4 IBMA 61 (1975). In that matter, the mine operator, as the Respondent here, in effect conceded the existence of the violative conditions (a lack of various items of safety equipment) but argued that no violation should have been found because the equipment required by the regulations was not available. In Itmann, the Board affirmed its prior holding in Buffalo Mining Company, 2 IBMA 226m, 80 I.D. 630 (1973), that "* * * Congress did not intend that a section 104(b) notice be issued or a civil penalty assessed where compliance with a mandatory health or safety standard is impossible due to unavailability of equipment, materials, or qualified technicians."

6/ I have found the following testimony of Respondent's Division Safety Director to be persuasive:

"Q. In your opinion, Mr. Given, based on your experience with Sewell for the thirteen years you've been employed there and your knowledge of the Meadow River No. 1 Mine, do you believe the number of employees at the Meadow River No. 1 Mine during the strike were capable of eliminating all the conditions which occurred in the mine as a result of natural deterioration which might constitute violations of the Act?

A. No, we did not have enough for that, I don't believe.

Q. Can you generally summarize for the Court why?

A. Well, the fact you have twenty-five miles of entry and crosscuts to look after. You know. We didn't have a work force there, and the people we were using weren't very experienced in doing these things. And it's just physically impossible for a fellow to cover all these areas and take care of every conceivable condition." (Tr. 91).

7/ To avoid interfering with labor-management relations, and presumably, to avoid pressuring one of the parties involved in an economic strike to the benefit of the other.

8/ The subject of safeguard notices--for which penalties are not sought--was raised at the hearing but not subsequently pursued by either party (Tr. 58).

The burden of establishing that compliance with the safety standards is impossible rests of course on the mine operator charged. Here, as the proponent of the rule, Respondent clearly carried its burden and established a *prima facie* case by its evidence that the mine was idled by an economic strike, that the mine deteriorates rapidly when idle due to natural forces, that the two violations charged occurred as a result of such natural deterioration, that the small complement of men (33 management personnel) available was insufficient to correct conditions in such a large mine (25 miles of entries and crosscuts), and that the realities of labor--management relations made it impossible to hire additional personnel to keep the mine violation--free during the prolonged period of its idleness.

Petitioner failed to rebut Respondent's evidence in those respects. In contrast to the persuasive evidentiary presentation by Respondent, Petitioner failed to establish, even in a general way, how it would have been possible for Respondent to either prevent or correct the various physical problems occurring during the work stoppage. Petitioner's stated policy of not forcing management personnel to perform manual labor during a strike seems to be in contradiction to its prosecution of this proceeding.

I conclude that Respondent's position is meritorious and that the two notices of violation involved should be vacated.

ORDER

1. All proposed findings of fact and conclusions of law proposed by the parties which are inconsistent with the foregoing are rejected.

2. Notices of Violation 2 HSD (8-0004) issued February 12, 1978, and 1 HSG (8-0005) issued February 14, 1978, are VACATED.

Michael A. Lasher, Jr., Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

FEB 12 1980

CONROCK COMPANY, Applicant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST OF CITATION DOCKET NOS. WEST 79-373-RM WEST 79-374-RM (CONSOLIDATED) CITATION NOS. 384009, 8/1/79 384010, 8/1/79 MINE: UPLAND PIT AND MILL

DECISION

APPEARANCES:

Scott J. Walcott, Esq., 3200 San Fernando Road, Los Angeles, California 90065, for the Applicant.

Marshall P. Salzman, Esq., Office of Daniel W. Teehan, Regional Solicitor, United States Department of Labor, San Francisco, California 94102, for the Respondent.

Before: Judge John J. Morris

Applicant, Conrock Company, seeks review of two citations alleging its workers were exposed to excessive noise concentrations in violation of 30 CFR 56.5-50. [1/]

[1/] The cited standard provides in part as follows:

> 56.5-50 Mandatory. (a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971, "General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Health and Safety District or Subdistrict Office of the Mine Safety and Health Administration.

Footnote 1/ Cont'd on Page 2

The citations were issued pursuant to Section 104(a) [2/] of the Federal Mine Safety and Health Amendments Act of 1977 (30 U.S.C. 801 *et seq.*).

ISSUES

The issues are whether the standard is impermissibly vague and whether Conrock violated it.

Conrock contends the excessive noise levels must be measured by the noise actually reaching the employee's ears. Further, Conrock asserts the standard in contest is unenforceably vague. Finally, Conrock argues that MSHA failed to meet its burden of proof in respect to Citation 384010.

The contentions of Conrock and MSHA's counter arguments require a review of the uncontroverted evidence.

Footnote 1/ Cont'd

PERMISSIBLE NOISE EXPOSURES

Duration Per Day, Hours of Exposure	Sound Level dBA, Slow Response
8	90
6	92
4	95
3	97
2	100
1 1/2	102
1	105
1/2	110
1/4 or less	115

No exposure shall exceed 115 dBA. Impact or impulsive noises shall not exceed 140 dB, peak sound pressure level.

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table.

[2/] 30 U.S.C. 814

FINDINGS OF FACT
CITATION 384009

1. The noise exposure to Conrock's truck driver, who was wearing ear plugs, was 21.6 percent of permissible limit, or about 96 dBA (Tr 9-14, 26).

2. A dosimeter was worn by the driver for 430 minutes; it measured an average exposure of between 95 and 96 dBA (Tr 11-14).

3. Engineering controls to reduce the noise levels include a barrier at the firewall (Tr 21, 60).

4. Holes in the floor could be plugged (Tr 21, 57).

5. Most of the noise was coming from in front of the driver's feet (Tr 42-43).

6. The cost of the controls would not exceed $200; companies selling insulating material also make engineering recommendations (Tr 62).

7. Controls on the truck, if implemented, would reduce the noise level to within permissible limits.

8. Conrock implemented engineering controls on its Euclide truck at its Capistrano plant; these controls reduced the noise levels to within permissible limits (Tr 73-74, R4, R5).

CITATION 384010

9. A noise sampling was taken by the plant operator who is stationed near one of the sizing screens and the crusher (Tr 22, 23).

10. Most of the time the plant operator, who was wearing earplugs, was outside of his metal 3 X 5 X 6 foot high metal shack; the uninsulated shack was 3 to 4 feet from the shaker screen (Tr 23, 26).

11. The greatest amount of noise came from the shaker screen (Tr 24).

12. Sampling for 485 minutes, an 8 hour shift, indicated a noise level at 165 percent of the permissible limit (Tr 24, 53).

13. Engineering controls for the plant operator include installing a barrier, insulating the shack, or moving it, (Tr 62-63).

14. MSHA recommendations, if implemented, would reduce the noise levels to within permissible limits at a cost of $200 to $300 (Tr 64).

DISCUSSION

For the reasons hereafter stated, I dismiss the contests filed herein.

Conrock's initial contention is that MSHA must measure the alleged violation by the noise actually reaching the worker's ears. The thrust of Conrock's argument seeks to place personal protective equipment, such as ear plugs, before feasible administrative or engineering controls.

The plain wording of Section 56.5-50(b) is directly contrary to Conrock's contention. The section initially requires administrative or engineering controls. If they do not reduce the noise levels, then personal protective equipment is required. The rationale for this approach appears to lie in the fact that workers prefer not to use ear plugs. In addition, the ear plugs are not always fitted properly. Further, ear plugs cannot eliminate all frequencies of noise (Tr 66-67).

Applicant's second contention attacks the vagueness of the standard in regards to its requirement of "feasible administrative or engineering controls."

The test of vagueness is whether the standard is so indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application, Allis-Chalmers Corporation v. Occupational Safety and Health Review Commission 542 F2d 27 (7th Cir., 1976).

Applicant's reliance on Hilo Coast Processing Company v. Secretary of Labor, MSHA DENV 79-50-M is misplaced. Commission Judge Charles C. Moore, Jr., did not rule the standard invalid but he indicated MSHA failed to prove that the recommended engineering controls were technically and economically feasible. Further considering vagueness compare Brennan v. OSHRC AND Santa Fe Transport Company 505 F2d 869, (10th Cir., 1974).

Applicant cites three Occupational Safety and Health Review Commission (OSHRC) cases in support of its argument that "the vagueness issue has not been put to bed by OSHRC." I disagree, OSHRC has repeatedly ruled that the Occupational Safety and Health Standard 3/ relating to noise exposure was not vague, cf Secretary of Labor

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3/ The Occupational Noise Exposure Standard, 29 CFR 1910.95 reads in part as follows:

> (a) Protection against the effects of noise exposure shall be provided when the sound levels exceed those shown in Table G-16 when measured on the A scale of a standard sound level meter at slow response. When noise levels are determined by octave band analysis, the equivalent A-weighted sound level may be determined as follows:

TABLE G-16 PERMISSIBLE NOISE EXPOSURES[1]

Duration Per Day, Hours of Exposure	Sound Level dBA, Slow Response
8	90
6	92
4	95
3	97
2	100
1 1/2	102
1	105
1/2	110
1/4 or less	115

(1) When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

Exposure to impulsive or impact noise should not exceed 140 dB peak sound pressure level.

(2) If the variations in noise level involve maxima at intervals of 1 second or less, it is to be considered continuous.

(3) In all cases where the sound levels exceed the values shown herein, a continuing, effective hearing conservation program shall be administered.

v. Boise Cascade Corporation, Composite, Docket No. 802 (April 1977); Secretary of Labor v. Wheeling Pittsburg Steel Corporation, Docket No. 13286 (November 1977).

In this case MSHA established that engineering controls would reduce the noise levels to within permissible limits. Concerning the Euclide truck see the facts in Paragraphs 3, 4, 5, 6, 7, 8, in this decision. Concerning the plant operator, see facts in Paragraphs 13 and 14.

MSHA's evidence shows that as an administrative control Conrock could rotate its workers after four hours at the site. I reject this proposal since the record presents no foundation to establish the feasibility of this proposal.

Conrock's post trial brief points to the testimony of witness Readon to establish a failure of MSHA's proof on feasibility. I reject this view since witnesses Drussel and Polk directly established economic and technical feasibility. In determining the issues here, the entire record must be considered.

Applicant's final argument is that MSHA failed to prove the economic and technical feasibility of its recommendations for the plant operator's shack. Contrary to Conrock's argument MSHA's engineering recommendations at a cost of $200 - $300 are unrebutted (Fact 13, 14).

CONCLUSIONS OF LAW

1. Applicant's Euclide truck operator was exposed to excessive noise and applicant violated 30 CFR 56.5-50; the contest of Citation 384009 should be dismissed (Facts 1 - 8).

2. Applicant's plant operator was exposed to excessive noise and applicant thereby violated 30 CFR 56.5-50; the contest of Citation 384010 shoud be dismissed (Facts 9 - 14).

Based on the foregoing findings of fact and conclusions of law, I enter the following:

ORDER

The contests of Citations 384009 and 384010 are dismissed.

John J. Morris

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 12 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner
v.

THE NORTH AMERICAN COAL CORP.,
Respondent

QUARTO MINING COMPANY,
Respondent

Civil Penalty Proceedings

Docket No. LAKE 79-118
A/O No. 33-00939-03042
Docket No. LAKE 79-214
A/O No. 33-00939-03055
Docket No. LAKE 79-263
A/O No. 33-00939-03059
Docket No. LAKE 80-64
A/O No. 33-00939-03066
Powhatan No. 3 Mine

Docket No. LAKE 79-262
A/O No. 33-00938-03050
Docket No. LAKE 80-61
A/O No. 33-00938-03052
Powhatan No. 1 Mine

Docket No. LAKE 79-266
A/O No. 33-00937-03031
Docket No. LAKE 80-65
A/O No. 33-00937-03034
Powhatan No. 5 Mine

Docket No. VINC 79-124-P
A/O No. 33-01157-03021
Docket No. LAKE 79-228
A/O No. 33-01157-03079
Docket No. LAKE 79-265
A/O No. 33-01157-03082
Docket No. LAKE 80-31
A/O No. 33-01157-03083
Docket No. LAKE 80-32
A/O No. 33-01157-03084
Powhatan No. 4 Mine

Docket No. LAKE 79-229
A/O No. 33-02624-03055
Docket No. LAKE 80-95
A/O No. 33-02624-03066
Docket No. LAKE 80-96
A/O No. 33-02624-03065
Powhatan No. 7 Mine

NACCO MINING COMPANY,
Respondent

: Docket No. LAKE 79-230
: A/O No. 33-01159-03059
: Powhatan No. 6 Mine

DECISION

The issue in the above-captioned cases and the arguments of the parties are identical to those involved in Secretary of Labor v. Alabama By-Products Corp., Docket No. SE 79-110, *et al*. which I have decided today. For the reasons set forth in the latter opinion, a copy of which is attached, the citations in the instant cases are vacated and the petitions are DISMISSED.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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FEB 12 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	Civil Penalty Proceedings
v.	Docket No. SE 79-110 A/O No. 01-00347-03023
ALABAMA BY-PRODUCTS CORPORATION, Respondent	Docket No. SE 79-82 A/O No. 01-00347-03021
	Docket No. SE 80-8 A/O No. 01-00347-03030
	Segco No. 1 Mine
	Docket No. SE 79-33 A/O No. 01-00515-03015
	Docket No. SE 79-74 A/O No. 01-00515-03019
	Docket No. SE 79-108 A/O No. 01-00515-03020
	Docket No. BARB 79-215-P A/O No. 01-00515-03008
	Mary Lee No. 1 Mine
	Docket No. SE 79-123 A/O No. 01-00340-03024
	Gorgas No. 7 Mine

DECISION

Docket No. SE 79-110 was originally assigned to me. The other listed docket numbers were subsequently consolidated with SE 79-110 because of the similar parties and issues. While all of the files do not contain identical documents, Respondent's motion for summary decision and supporting papers, together with MSHA's opposition and supporting affidavit, are applicable to all of the consolidated cases. After the motion was filed and briefed, the

Attachment for LAKE 79-118 etc

parties entered a stipulation resolving all factual disputes and submitted the matter for decision on the stipulation and further briefing. By submitting the stipulation and further briefing based thereon, Respondent has abandoned its motion for summary decision. This decision is therefore based on the stipulation and arguments. Also, there is another sizable group of cases which have been consolidated under the caption Secretary of Labor v. North American Coal Corporation, et al., Docket Nos. LAKE 79-118, et al., which involve the identical issue although facts were not stipulated in those cases.

The question before me is whether there is a valid and enforceable respirable dust standard. On June 28, 1974, in Secretary of Labor v. Olga Coal Company, Docket No. HOPE 79-113-P, I issued a decision in which I held that "there is not now and never has been a valid enforceable respirable dust program * * *" (Dec., p. 2). I had previously made a similar ruling in MSHA v. B.B.W. Coal Company, Docket No. PIKE 76-149-P on January 9, 1979. Those rulings were made without the benefit of briefing and I think it is necessary that I reexamine the matter at this time.

Respirable dust, is an extremely important part of both the 1969 and 1977 Mine Acts. Respirable coal mine dust causes coal miners pneumoconiosis or black lung, and it has been estimated that 173,000 miners and 333,000 survivors are receiving black lung compensation from the Federal Government (see statement of John A. Breslin contained in Bureau of Mines' Information Circular 8753 published in 1973). It is because I consider it such an important program that I have been disturbed by the way the Bureau of Mines, MESA, and MSHA have dealt with that program.

I first considered respirable dust in a decision issued on July 9, 1973, in Valley Camp Coal Company, Docket No. MORG 72-88-P. I was unsatisfied with the quality of the proof offered in the respirable dust violations and rejected the evidence as being unconvincing. Subsequently, the Board of Mine Operations Appeals decided the Castle Valley Mining Company case, 3 IBMA 10 (January 25, 1974), in which it held that a computer printout, standing alone, would establish a violation of the respirable dust standard. I next considered respirable dust in Eastern Associated Coal Corporation, Docket Nos. MORG 73-131-P et al. (December 16, 1974). In that case, I heard experts from MESA's respirable dust laboratory in Pittsburgh, as well as the testimony of Dr. Corn, who had done extensive research in connection with respirable dust. It was during the course of those hearings that I learned that MESA had been completely ignoring the statutory definition of respirable dust since the inception of the program. Instead of attempting to modify its equipment or work out some conversion factor, MESA chose to pretend that Congress had not defined respirable dust as only those dust particles of 5 microns or less in diameter. The evidence clearly established that MESA had been counting, as respirable coal mine dust, particles not only in excess of 5 microns in diameter, but also in excess of 10 microns in diameter. I am attaching as Appendix I excerpts from my opinion in that case which describe the dust-collecting instruments and the procedure at the Pittsburgh laboratory.

The Interior Department's Board of Mine Operations Appeals eventually ruled that the respirable dust procedures were invalid because MSHA had collected, and counted as respirable coal mine dust, particles which did not meet the statutory definition of respirable dust. Eastern Associated Coal Corporation, 7 IBMA 14 (1976), and 7 IBMA 133 (1976). Again, instead of attempting to modify its equipment, MESA sought, and obtained an order from the Secretary of the Interior staying the effect of the decision of the Board of Mine Operations Appeals. Such an appeal to the Secretary was not provided for in the published rules of the Department and, in my opinion, would not have survived a court test, but the stay was eventually dissolved and the Board's opinion became final.

The golden opportunity for the enforcement branch came on November 9, 1977, when Congress eliminated the statutory definition of respirable dust in the old Act and amended section 202(e) of the Act to read: "References to concentrations of respirable dust in this title mean the average concentration of respirable dust measured with a device approved by the Secretary and the Secretary of Health, Education and Welfare." While this is not a definition of respirable dust, it does appear to give the Secretary of Labor and the Secretary of Health, Education and Welfare the opportunity to establish a definition of respirable dust based on the size and type of dust which certain equipment collects. The Solicitor has taken the position that because section 202(e) of the Act became effective before the other sections of the Act, the definition of "Secretary" contained in the 1977 Act as the Secretary of Labor was not effective and that therefore, "Secretary" in section 202 means the Secretary of the Interior. The argument goes on that since the Secretary of the Interior and the Secretary of Health, Education and Welfare approved certain devices for the collection of respirable dust back in the 1970, Congress intended to ratify that 7-year old agreement and define as respirable dust anything collected by the MRE or the personal sampling device. This is obviously a contrived piece of backfilling because at no time has MSHA or MESA or anyone else contended that the oversized particles collected by both of these pieces of equipment was respirable dust. To do so would be to contravene the sworn testimony of the experts in the field and would be despite the "Report to the Senate Committee on Labor and Public Welfare", issued December 1975 and the Report of W. G. Courtney, research supervisor, dust control and life support group, dated November 29, 1974. The latter contains the following statements.

* * * * * * *

> 3. Sampler precision. MESA enforces the dust standard by stipulating that (1) the company use approved personal samplers and (2) the company-obtained 10-shift average for the dust level be less than 2.1mg/m^3.
>
> Using data obtained by MESA personnel using approved personal samplers, we have established that the approved samplers have a precision of only 30 pct (standard deviation) when routinely used in the field. Thus, if 100 MESA inspectors went

into the field to measure with approved dust samplers a dust cloud known to have a concentration of 2.0 mg/m^3 (MRE equivalent), 68 of their measurements would be between 1.4 and 2.6 mg/m^3 and 32 of the measurements would be outside this range.

Assuming that the precision of operator samples is as good as the precision of MESA inspector samples (a dubious assumption), the operator 10-shift average must be greater than 2.36 mg/m^3 to be 95 pct confident that the true average concentration is actually above 2.0 mg/m^3. More important, a 10-shift average of less than 1.64 mg/m3 is required to assure that the worker is not being exposed to hazardous dust levels as established by law. With the present limited precision of approved personal dust samplers in the field, 129 shifts must be sampled and averaged to reduce the width of the uncertainty to ± 0.1 mg/m^3.

* * * * * * *

5. Sampler flowrate. However, the MESA 0.1 mg/m^3 standard for respirable quartz dust does not match any known medical standard. MESA-coal requires that the approved personal sampler be operated at 2.0 ℓ/min when used for enforcement purposes in coal mines, while the semi-official ACGIH recommendation of 0.1 mg/m^3 for the respirable quartz dust is based on a sampler flowrate of 1.7 ℓ/min. Our field tests have indicated that similar masses of respirable dust are obtained when the approved personal sampler is operating at 1.7 or 2.0 ℓ/min. Therefore, a quartz dust level of only 0.085 mg/m^3 when sampled at 2.0 ℓ/min should be permitted in order to match the ACGIH standard of 0.1 mg/m^3 when sampled at 1.7 ℓ/min. The percentage of coal miners being subjected to excessive amounts of respirable quartz dust thus is even higher than 20 pct.

* * * * * * *

We conducted a detailed comparison of company-obtained dust levels with MESA-obtained dust levels for the same sections. Results indicated that, on the average, MESA dust levels are about 30 pct higher than operator dust levels. This poor comparison casts grave doubts about the veracity of operator data and thus the entire MESA enforcement program.

* * * * * * *

In summary, the MESA enforcement program to ensure that coal mine personnel are working in a healthful dust-free environment involves seven major features. We have shown that, for each of these features, the MESA procedure is unsatisfactory. As a result of this inadequate enforcement program, our coal mine personnel are being subjected to flagrantly hazardous environments, despite public reports to the contrary.

In view of these comments, I cannot believe Congress intended to perpetuate the discredited program. It intended that the Secretary of Labor and the Secretary of Health, Education and Welfare come up with a new definition. They have not done so.

But even if it could be said that it was the Secretary of the Interior and the Secretary of Health, Education and Welfare that could have established a new respirable dust definition, the fact is that such a new definition has not been established. To this day, 30 CFR 75.2(k) states "'Respirable dust' means only dust particulates 5 microns or less in size." It is axiomatic that an agency binds itself by its own regulation even though the Act of Congress would allow a different result. Vitarelli v. Seaton, 359 U.S. 535 (1959); Accardi v. Shaugnessy, 347 U.S. 260 (1945); Service v. Dulles, 354 U.S. 363 (1957); Pacific Molasses Company v. Federal Trade Commission, 356 F.2d 386, 389 (5th Cir. 1966). Under these authorities, the definition of respirable dust is still particles (particulates) of 5 microns or less in diameter. Under that standard, the program cannot be enforced using the type of collection equipment which MSHA currently uses. */

In my view, MSHA has two choices in order to institute an effective and enforceable respirable dust program. One, it can either develop equipment or modify equipment so as to collect and weigh only particles 5 microns or less in diameter or two, it can amend its regulations so as to rescind the definition contained in 30 CFR 75.2(k) and have the Secretary of Labor and the Secretary of Health, Education and Welfare agree on a new definition for and a device for the measurement of respirable dust.

In view of the importance of any early resolution of this matter, I urge the Commission to review this case on its own motion under 29 CFR 2700.71 and set an accelerated briefing schedule.

Judgment is for Respondent and the citations are vacated.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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*/ I realize this paragraph is contrary to some of my previous rulings regarding respirable dust, but I now believe that the 5-micron definition is still in effect.

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APPENDIX I

EXCERPTS FROM JUDGE MOORE'S DECISION IN EASTERN ASSOCIATED COAL CORPORATION DOCKET NOS. MORG 73-131-P et al (Dec. 16, 1974)

With reference to these 22 respirable dust violations, (footnote omitted) in Castle Valley Mining Company, 3 IBMA 10 (January 25, 1974) the Board of Mine Operations Appeals decided that the computer printout designated as a Notice of Noncompliance creates prima facie proof of the facts asserted therein regarding the respirable dust content of tested samples. In the absence of any rebutting evidence the printout's introduction into evidence may establish the violation. MESA relied almost exclusively on Castle Valley in its presentation of the instant case.

In the Castle Valley case, however, there were a number of other holdings by the Board that bear on the outcome of the instant decision. In that case there had been no evidence, except for that contained in various circulars of which the Board of Mine Operations Appeals took official notice, of the testing procedures employed by MESA's testing laboratory in Pittsburgh, Pennsylvania. The Board took official notice also that the techniques employed by MESA in respirable dust testing "are based upon scientific principles generally recognized in the scientific community." But, as pointed out by Respondent, the Board relied on facts "officially noticed" without giving the parties an opportunity to rebut such facts as required by the Administrative Procedure Act. Inasmuch as the Respondent in that case did not appear at the hearing before the Board, however, the Board may have reasoned that Respondent was in default and thus not entitled to the opportunity to rebut officially noticed evidence. In any event, Respondent Eastern Associated Coal Corporation is challenging the scientific validity of MESA's testing procedures in the instant case, and its right to do so was specifically recognized by the Board on page 14 of its Castle Valley decision where it stated "of course, either the operator or MESA may question the reliability of the system at any stage."

Other statements about notices of noncompliance made by the Board in Castle Valley which bear on the decision in the instant case are:

> [at page 19] All other circumstances of the making of such writing or record, including lack of personal knowledge by the enterant or maker, may be shown to affect its weight, but the circumstances shall not affect its admissibility.
>
> [at page 21] This section does not make a government document received in evidence conclusive, irrefutable, or immutable. If such papers do not speak the truth, the defense can prove the untruth of the document.
>
> [at page 22] Full discovery procedures were available to Castle Valley had they had any reason to question the reliability of the information recorded in the Notice of Noncompliance.

Respondent in this case has taken advantage of the discovery procedures provided by our rules and has attempted to prove the unreliability of the testing procedure. Although it has not actually demonstrated the untruth of any particular Notice of Noncompliance, Respondent has made such a showing that I cannot simply rely on Castle Valley and rule that the Notices of Noncompliance in evidence in this case establish the fact that Respondent has violated the respirable dust standard.

Regarding respirable dust, its definition, and measurement, we were indeed fortunate to have as witnesses such eminent experts as Dr. Morton Corn who has studied the subject for many years, Mr. Murray Jacobson who has also been involved in the respirable dust program for many years and who in fact set up the testing program in issue in this case, and Mr. Paul Parobeck who is currently in charge of the MESA respirable dust laboratory in Pittsburgh.

Respirable dust does not consist of coal dust exclusively. It is coal mine dust which would include fine particles of coal as well as any other fine particles of rock or other dust that may be found in a coal mine. When a miner breathes the dust contained in the atmosphere of a coal mine, a certain portion of that dust is filtered out in the nose, trachea and bronchial areas of the respiration system and another portion is deposited in the lungs or pulmonary compartment. Years of study have shown that it is the larger particles that are filtered out or deposited on surfaces of the respiratory system before reaching the lungs. It is only those small particles that pass through the filtering system and are deposited in the lungs which will lead to the disease known as coal miner's pneumoconiosis and which are accordingly called respirable dust.

Some of the testimony concerning respirable dust referred to a Bureau of Mines information circular dated February, 1971, entitled Sampling and Evaluating Respirable Coal Mine Dust bearing the number IC8503. On page three of that document, there appears a graph which plots the diameter and density of the particles of coal mine dust against the percentage of penetration or deposition of such dust in the lungs, in a personal sampler device and in an MRE instrument. 5/ While it is not exactly clear from the graph itself, the solid line indicates the manner in which various sizes of dust are deposited in the lungs, the dashed line designated "AEC", (a development of the Atomic Energy Commission,) indicates the same information with respect to deposition in the personal respirable dust sampler, developed by the Bureau of Mines and the line consisting of both dashes and dots and designated "MRE" indicates the amount of dust deposited in an MRE Isleworth Gravometric Dust Sampler, which is referred to as the MRE instrument. So far as the two instruments are concerned, deposition as depicted by the graph, indicates that part of the coal mine dust which is deposited in the section of the instrument which is designed to be equivalent to the lungs, i.e. the filter. Both instruments contain areas which are designed to eliminate dust that would ordinarily be deposited in the nose, trachea or bronchial areas of the human respiration system. The two instruments do this filtering out of the larger non-respirable particles by taking

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5/ A copy of the referenced graph is designated Figure I.

advantage of the fact that if two spherical particles composed of the same substance are allowed to fall in an atmosphere, the larger particle will fall faster. This is because, as the size of spherical particles increase the cross-sectional diameter and therefore the air resistance is not increased to the same extent as the volume, (thus the mass of the particle) increases. In moving air, therefore, the larger particle will fall out sooner than the smaller particle. In the MRE instrument the air flow rate is such that the large particles fall out along the horizontal elutriator and only the smaller particles are deposited upon the filter which is later weighed. The air flow rate in this instrument is 2.5 liters per minute. It is obvious, that if the air flow in this instrument were increased, the larger particles would be deposited upon the filter whereas if it were decreased, particles normally reaching the filter might be deposited in the elutriator.

The personal sampler works on the same principle except that a cyclonic system is used to cause increased acceleration for the purpose of driving larger (i.e. heavier) particles to the outside of the circling atmosphere. The personal sampler must operate with an air flow of 2 liters per minute, and it is equally obvious that in this system an increase in the air flow will increase the G loads and thus cause the particles which might ordinarily reach the filter to drop out earlier, whereas too low an air flow would cause such larger, non-respirable particles to reach the filter. Any variation in the air flow in the two instruments therefore has the opposite effect. In one, increased air flow would cause an error of too small a particle being deposited on the filter whereas the same increased air flow in the other instrument would cause too large a particle to be deposited on the filter. The proper rate of air flow is thus extremely critical to both instruments.

Assuming both instruments are properly adjusted, the graph on page 3 of Information Circular 8503, [Figure I herein] shows that neither instrument collects on its filter, dust exactly corresponding to that collected by the lungs. The graph indicates that the MRE instrument will collect particles up to 7.1 microns in diameter whereas the personal sampler will collect particles up to 10 microns in diameter. While the graph is not exactly clear as to the pulmonary deposition, it appears to indicate deposition of particles up to somewhere between slightly over 6 microns and 7 microns in the lungs. There are other significant differences in the graphs. For example, both the personal sampler and the MRE instrument collect between 90 and 100 percent of the coal mine dust 2 microns in diameter whereas the lungs collect only

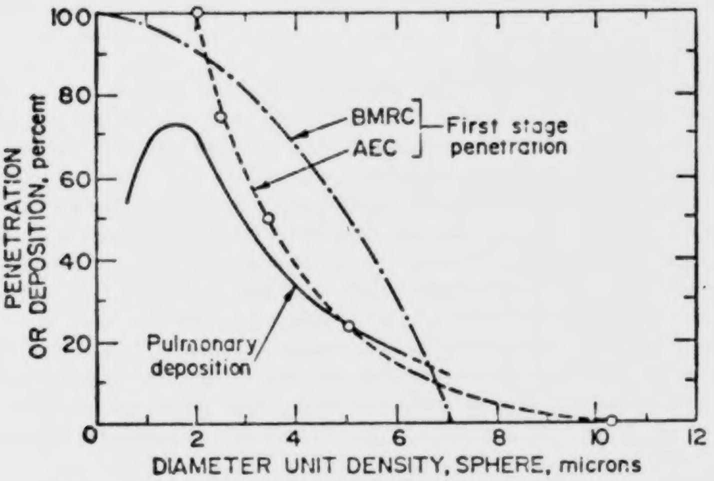

FIGURE 1. - Comparison of Respirable Size Criteria With Pulmonary Deposition Curve.

FIGURE I

somewhere between 70 and 75 percent of that size particle. The lungs collect only 54 percent of the particles that are a half micron in diameter whereas both instruments collect almost 100 percent of that size of particle. But it must be assumed that the Congress knew of the collection curves involved when it passed the Act and defined respirable dust as those particles of coal mine dust 5 microns or less in diameter. And, in the area between 5 micron particles and 2 micron particles the personal sampler curve is very close to the pulmonary curve. While the personal sampler does collect particles up to 10 microns in size, it collects a very small percentage of particles with a diameter in excess of 7 microns. The fact remains, however, that the instruments do collect particles larger than the statutory definition of respirable dust. 6/

From the aforementioned distribution curve, it appears that both the lungs and the personal sampler collect slightly more than 20 percent of the particles that are 5 microns in diameter. The personal sampler collects almost no particles that are 10 microns in diameter, and from observing the curve it would appear that the personal sampler collects approximately 10 percent of those particles between 5 microns in diameter and 10 microns in diameter. The fact that the personal sampler collects 10 percent of the dust that is larger than the statutory definition of respirable dust, however, does not mean that 10 percent of the dust collected by the sampler is too large to be considered respirable dust. It means that whatever quantity of that size particles is contained in the mine atmosphere, the personal sampler will collect 10 percent of that total quantity on its filter.

6/ The fact that in Section 202(e) of the Act it states "references to concentrations of respirable dust in this title means the average concentration of respirable dust if measured with an MRE instrument or such equivalent concentration as measured with another device approved by the Secretary of Health, Education and Welfare" does not mean that anything measured by an MRE instrument or another equivalent device would be respirable dust. While concentrations of such dust are to be measured in such instruments, there is no equivocation or uncertainty about the proscriptions of Section 318(k) which states in no uncertain terms "'respirable dust' means only dust particles 5 microns or less in size ..." (Underscoring supplied)

While there was no testimony on the point, it would seem reasonable that a slight increase in the air flow of the personal sampler would tend to prevent the larger particles of dust in excess of 5 microns in diameter from being deposited upon the filter. I must assume, however, that if such a simple solution would work, it would have been undertaken and that, therefore, any increase of air flow would affect the accuracy of the device in collecting the smaller particles of respirable dust. Also, it may be that rather than trying to approximate the human respiration system, the technicians should seek to devise an instrument which will measure and weigh only particles of dust 5 microns or less in diameter, but such a determination is not within the province of this hearing. We deal here with the devices as they exist, not as they might be.

The dust sampling procedure established by the Bureau of Mines has been described in Information Circulars 8484, 8520, and 8503, as well as in other publications of the Bureau of Mines and MESA. The testimony in this case agrees with the descriptions referred to and will only be explained herein in general terms. In general, the mine operator purchases cassettes for the purpose of measuring respirable dust from a manufacturer who has its cassettes and the empty filter weight data checked by the Bureau of Mines on a routine basis. The cassette has a serial number and a mine data card accompanying it has the same number. After the test has been run in the personal sampler the cassette and mine data card, filled out so far as required, are forwarded to the Pittsburgh testing laboratory.

The Pittsburgh testing laboratory is maintained under controlled temperature and humidity and at a pressure slightly higher than the surrounding areas so that there will be no dust drawn into the laboratory. The cassettes received from the mine operator are opened in the laboratory, and the mine data card and capsule containing the filter are placed on trays and the numbers on the card and capsule are checked. They are then desiccated i.e. dried, to remove any moisture that might otherwise affect the weight, and moved to an electronic balance where devices are placed to nullify any electrostatic effect that might distort the actual weight of the filter. The filter is weighed on the electronic balance and an operator notes the weight and writes it down on the mine data card. At that point the technician performing the weighing operation makes a mental calculation to determine if the weight gain, that is the difference between the recorded empty weight of the filter and the weight of the filter with the dust particles deposited thereon, is greater than 6 milligrams.

If it is, the sample is put aside for testing for oversize particles, but if there is a weight gain of 6 milligrams or less, the sample is discarded and destroyed. No record is kept on the mine card or anywhere else as to which of a number of technicians made the actual weighing on any particular sample. After the weighing, the results are punched out on a keypunch teletype system by one operator and then a different person keypunches the same data again. The system is such that if the two operators do not punch out exactly the same data, an automatic notification is given so that the operators can check to see if one or the other made an error in transcribing the information from the mine data card. The data punched into the system, goes directly to the computer in Denver, Colorado which, at a later date, determines if any 10 consecutive valid samples comply or do not comply with the standard in effect.

Throughout this procedure, at several places, the mine data card and filter identification numbers are checked. But there was at the time of the violations involved in this case, no double check of the visual weight display observed by the person operating the balance. At a later time, subsequent to Mr. Parobeck's deposition (Respondent's Exhibit 14) but prior to the hearing, a spot check system was instituted whereby a certain number of these weighings were later duplicated by a different operator on a random basis to see if a discrepancy had occurred.

The testimony indicated that the decision to check filters showing a weight gain greater than 6 milligrams was an arbitrary decision not based on any particular studies. With respect to those capsules, showing the 6 milligram weight gain, first they are examined to see if oversized particles appear visually without the aid of a microscope. It such particles appear the sample is voided. If they do not appear, however, the filter is examined under a microscope with various sections of the filter designated as fields. It is not stated in the testimony the exact size of a field, but 10 of these fields are examined and the sample is voided if these 10 fields each show three or more particles that are in excess of 10 microns in size. Mr. Parobeck's testimony made it clear that if nine of these fields all show more than 3 particles in excess of 10 microns but the 10th field did not show such particles, the sample would not be voided. It is thus fairly clear that in addition to the particles over 5 microns in diameter, particles in excess of 10 microns in diameter and thus also not respirable are counted against a Respondent whether the sample weight gain is more than 6 milligrams or less than 6 milligrams since no test is taken regarding the weight gains of less than 6 milligrams. 7/

In the Castle Valley case, supra, the Board of Mine Operations Appeals stated that a notice of non-compliance which is a computer print-out from the Denver computer, is prima facie evidence of a violation which can be rebutted. The Board indicated that in view of the discovery procedures available to a Respondent, he could challenge any notice of non-compliance that might be issued. As testimony has indicated in this case, however, discovery techniques will help a Respondent very little in determining whether or not his sample was actually tested properly. It is clear that he cannot discover who made the actual weighing, he cannot test the sample prior to sending it in because it would then be voided for tampering, and he cannot send in experts to test his sample after it has shown a greater than 3 milligrams result. There is in effect absolutely nothing a Respondent can do to defend itself if the computer print-out shows that it is in violation of the respirable dust standard.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 12 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner
v.

ALABAMA BY-PRODUCTS CORPORATION,
Respondent

Civil Penalty Proceedings

Docket No. SE 79-110
A/O No. 01-00347-03023

Docket No. SE 79-82
A/O No. 01-00347-03021

Docket No. SE 80-8
A/O No. 01-00347-03030

Segco No. 1 Mine

Docket No. SE 79-33
A/O No. 01-00515-03015

Docket No. SE 79-74
A/O No. 01-00515-03019

Docket No. SE 79-108
A/O No. 01-00515-03020

Docket No. BARB 79-215-P
A/O No. 01-00515-03008

Mary Lee No. 1 Mine

Docket No. SE 79-123
A/O No. 01-00340-03024

Gorgas No. 7 Mine

DECISION

Docket No. SE 79-110 was originally assigned to me. The other listed docket numbers were subsequently consolidated with SE 79-110 because of the similar parties and issues. While all of the files do not contain identical documents, Respondent's motion for summary decision and supporting papers, together with MSHA's opposition and supporting affidavit, are applicable to all of the consolidated cases. After the motion was filed and briefed, the parties entered a stipulation resolving all factual disputes and submitted the matter for decision on the stipulation and further briefing. By submitting the stipulation and further briefing based thereon, Respondent has abandoned its motion for summary decision. This decision is therefore based on the stipulation and arguments. Also, there is another sizable group of cases which have been consolidated under the caption Secretary of Labor v. North American Coal Corporation, et al., Docket Nos. LAKE 79-118, et al., which involve the identical issue although facts were not stipulated in those cases.

The question before me is whether there is a valid and enforceable respirable dust standard. On June 28, 1974, in Secretary of Labor v. Olga Coal Company, Docket No. HOPE 79-113-P, I issued a decision in which I held that "there is not now and never has been a valid enforceable respirable dust program * * *" (Dec., p. 2). I had previously made a similar ruling in MSHA v. B.B.W. Coal Company, Docket No. PIKE 76-149-P on January 9, 1979. Those rulings were made without the benefit of briefing and I think it is necessary that I reexamine the matter at this time.

Respirable dust, is an extremely important part of both the 1969 and 1977 Mine Acts. Respirable coal mine dust causes coal miners pneumoconiosis or black lung, and it has been estimated that 173,000 miners and 333,000 survivors are receiving black lung compensation from the Federal Government (see statement of John A. Breslin contained in Bureau of Mines' Information Circular 8753 published in 1973). It is because I consider it such an important program that I have been disturbed by the way the Bureau of Mines, MESA, and MSHA have dealt with that program.

I first considered respirable dust in a decision issued on July 9, 1973, in Valley Camp Coal Company, Docket No. MORG 72-88-P. I was unsatisfied with the quality of the proof offered in the respirable dust violations and rejected the evidence as being unconvincing. Subsequently, the Board of Mine Operations Appeals decided the Castle Valley Mining Company case, 3 IBMA 10 (January 25, 1974), in which it held that a computer printout, standing alone, would establish a violation of the respirable dust standard. I next considered respirable dust in Eastern Associated Coal Corporation, Docket Nos. MORG 73-131-P et al. (December 16, 1974). In that case, I heard experts from MESA's respirable dust laboratory in Pittsburgh, as well as the testimony of Dr. Corn, who had done extensive research in connection with respirable dust. It was during the course of those hearings that I learned that MESA had been completely ignoring the statutory definition of respirable dust since the inception of the program. Instead of attempting to modify its equipment or work out some conversion factor, MESA chose to pretend that Congress had not defined respirable dust as only those dust particles of 5 microns or less in diameter. The evidence clearly established that MESA had been counting, as respirable coal mine dust, particles not only in excess of 5 microns in diameter, but also in excess of 10 microns in diameter. I am attaching as Appendix I excerpts from my opinion in that case which describe the dust-collecting instruments and the procedure at the Pittsburgh laboratory.

The Interior Department's Board of Mine Operations Appeals eventually ruled that the respirable dust procedures were invalid because MSHA had collected, and counted as respirable coal mine dust, particles which did not meet the statutory definition of respirable dust. Eastern Associated Coal Corporation, 7 IBMA 14 (1976), and 7 IBMA 133 (1976). Again, instead of attempting to modify its equipment, MESA sought, and obtained an order from the Secretary of the Interior staying the effect of the decision of the Board of Mine Operations Appeals. Such an appeal to the Secretary was not provided for in the published rules of the Department and, in my opinion, would not have survived a court test, but the stay was eventually dissolved and the Board's opinion became final.

The golden opportunity for the enforcement branch came on November 9, 1977, when Congress eliminated the statutory definition of respirable dust in the old Act and amended section 202(e) of the Act to read: "References to concentrations of respirable dust in this title mean the average concentration of respirable dust measured with a device approved by the Secretary and the Secretary of Health, Education and Welfare." While this is not a definition of respirable dust, it does appear to give the Secretary of Labor and the Secretary of Health, Education and Welfare the opportunity to establish a definition of respirable dust based on the size and type of dust which certain equipment collects. The Solicitor has taken the position that because section 202(e) of the Act became effective before the other sections of the Act, the definition of "Secretary" contained in the 1977 Act as the Secretary of Labor was not effective and that therefore, "Secretary" in section 202 means the Secretary of the Interior. The argument goes on that since the Secretary of the Interior and the Secretary of Health, Education and Welfare approved certain devices for the collection of respirable dust back in the 1970, Congress intended to ratify that 7-year old agreement and define as respirable dust anything collected by the MRE or the personal sampling device. This is obviously a contrived piece of backfilling because at no time has MSHA or MESA or anyone else contended that the oversized particles collected by both of these pieces of equipment was respirable dust. To do so would be to contravene the sworn testimony of the experts in the field and would be despite the "Report to the Senate Committee on Labor and Public Welfare", issued December 1975 and the Report of W. G. Courtney, research supervisor, dust control and life support group, dated November 29, 1974. The latter contains the following statements.

* * * * * * *

> 3. Sampler precision. MESA enforces the dust standard by stipulating that (1) the company use approved personal samplers and (2) the company-obtained 10-shift average for the dust level be less than 2.1mg/m^3.
>
> Using data obtained by MESA personnel using approved personal samplers, we have established that the approved samplers have a precision of only 30 pct (standard deviation) when routinely used in the field. Thus, if 100 MESA inspectors went

into the field to measure with approved dust samplers a dust cloud known to have a concentration of 2.0 mg/m^3 (MRE equivalent), 68 of their measurements would be between 1.4 and 2.6 mg/m^3 and 32 of the measurements would be outside this range.

Assuming that the precision of operator samples is as good as the precision of MESA inspector samples (a dubious assumption), the operator 10-shift average must be greater than 2.36 mg/m^3 to be 95 pct confident that the true average concentration is actually above 2.0 mg/m^3. More important, a 10-shift average of less than 1.64 mg/m3 is required to assure that the worker is not being exposed to hazardous dust levels as established by law. With the present limited precision of approved personal dust samplers in the field, 129 shifts must be sampled and averaged to reduce the width of the uncertainty to ± 0.1 mg/m^3.

* * * * * * *

5. Sampler flowrate. However, the MESA 0.1 mg/m^3 standard for respirable quartz dust does not match any known medical standard. MESA-coal requires that the approved personal sampler be operated at 2.0 ℓ/min when used for enforcement purposes in coal mines, while the semi-official ACGIH recommendation of 0.1 mg/m^3 for the respirable quartz dust is based on a sampler flowrate of 1.7 ℓ/min. Our field tests have indicated that similar masses of respirable dust are obtained when the approved personal sampler is operating at 1.7 or 2.0 ℓ/min. Therefore, a quartz dust level of only 0.085 mg/m^3 when sampled at 2.0 ℓ/min should be permitted in order to match the ACGIH standard of 0.1 mg/m^3 when sampled at 1.7 ℓ/min. The percentage of coal miners being subjected to excessive amounts of respirable quartz dust thus is even higher than 20 pct.

* * * * * * *

We conducted a detailed comparison of company-obtained dust levels with MESA-obtained dust levels for the same sections. Results indicated that, on the average, MESA dust levels are about 30 pct higher than operator dust levels. This poor comparison casts grave doubts about the veracity of operator data and thus the entire MESA enforcement program.

* * * * * * *

In summary, the MESA enforcement program to ensure that coal mine personnel are working in a healthful dust-free environment involves seven major features. We have shown that, for each of these features, the MESA procedure is unsatisfactory. As a result of this inadequate enforcement program, our coal mine personnel are being subjected to flagrantly hazardous environments, despite public reports to the contrary.

In view of these comments, I cannot believe Congress intended to perpetuate the discredited program. It intended that the Secretary of Labor and the Secretary of Health, Education and Welfare come up with a new definition. They have not done so.

But even if it could be said that it was the Secretary of the Interior and the Secretary of Health, Education and Welfare that could have established a new respirable dust definition, the fact is that such a new definition has not been established. To this day, 30 CFR 75.2(k) states "'Respirable dust' means only dust particulates 5 microns or less in size." It is axiomatic that an agency binds itself by its own regulation even though the Act of Congress would allow a different result. Vitarelli v. Seaton, 359 U.S. 535 (1959); Accardi v. Shaugnessy, 347 U.S. 260 (1945); Service v. Dulles, 354 U.S. 363 (1957); Pacific Molasses Company v. Federal Trade Commission, 356 F.2d 386, 389 (5th Cir. 1966). Under these authorities, the definition of respirable dust is still particles (particulates) of 5 microns or less in diameter. Under that standard, the program cannot be enforced using the type of collection equipment which MSHA currently uses. */

In my view, MSHA has two choices in order to institute an effective and enforceable respirable dust program. One, it can either develop equipment or modify equipment so as to collect and weigh only particles 5 microns or less in diameter or two, it can amend its regulations so as to rescind the definition contained in 30 CFR 75.2(k) and have the Secretary of Labor and the Secretary of Health, Education and Welfare agree on a new definition for and a device for the measurement of respirable dust.

In view of the importance of any early resolution of this matter, I urge the Commission to review this case on its own motion under 29 CFR 2700.71 and set an accelerated briefing schedule.

Judgment is for Respondent and the citations are vacated.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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*/ I realize this paragraph is contrary to some of my previous rulings regarding respirable dust, but I now believe that the 5-micron definition is still in effect.

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APPENDIX I

EXCERPTS FROM JUDGE MOORE'S DECISION IN EASTERN ASSOCIATED COAL CORPORATION DOCKET NOS. MORG 73-131-P et al (Dec. 16, 1974)

With reference to these 22 respirable dust violations, (footnote omitted) in Castle Valley Mining Company, 3 IBMA 10 (January 25, 1974) the Board of Mine Operations Appeals decided that the computer printout designated as a Notice of Noncompliance creates *prima facie* proof of the facts asserted therein regarding the respirable dust content of tested samples. In the absence of any rebutting evidence the printout's introduction into evidence may establish the violation. MESA relied almost exclusively on Castle Valley in its presentation of the instant case.

In the Castle Valley case, however, there were a number of other holdings by the Board that bear on the outcome of the instant decision. In that case there had been no evidence, except for that contained in various circulars of which the Board of Mine Operations Appeals took official notice, of the testing procedures employed by MESA's testing laboratory in Pittsburgh, Pennsylvania. The Board took official notice also that the techniques employed by MESA in respirable dust testing "are based upon scientific principles generally recognized in the scientific community." But, as pointed out by Respondent, the Board relied on facts "officially noticed" without giving the parties an opportunity to rebut such facts as required by the Administrative Procedure Act. Inasmuch as the Respondent in that case did not appear at the hearing before the Board, however, the Board may have reasoned that Respondent was in default and thus not entitled to the opportunity to rebut officially noticed evidence. In any event, Respondent Eastern Associated Coal Corporation is challenging the scientific validity of MESA's testing procedures in the instant case, and its right to do so was specifically recognized by the Board on page 14 of its Castle Valley decision where it stated "of course, either the operator or MESA may question the reliability of the system at any stage."

Other statements about notices of noncompliance made by the Board in Castle Valley which bear on the decision in the instant case are:

> [at page 19] All other circumstances of the making of such writing or record, including lack of personal knowledge by the enterant or maker, may be shown to affect its weight, but the circumstances shall not affect its admissibility.
>
> [at page 21] This section does not make a government document received in evidence conclusive, irrefutable, or immutable. If such papers do not speak the truth, the defense can prove the untruth of the document.
>
> [at page 22] Full discovery procedures were available to Castle Valley had they had any reason to question the reliability of the information recorded in the Notice of Noncompliance.

Respondent in this case has taken advantage of the discovery procedures provided by our rules and has attempted to prove the unreliability of the testing procedure. Although it has not actually demonstrated the untruth of any particular Notice of Noncompliance, Respondent has made such a showing that I cannot simply rely on Castle Valley and rule that the Notices of Noncompliance in evidence in this case establish the fact that Respondent has violated the respirable dust standard.

Regarding respirable dust, its definition, and measurement, we were indeed fortunate to have as witnesses such eminent experts as Dr. Morton Corn who has studied the subject for many years, Mr. Murray Jacobson who has also been involved in the respirable dust program for many years and who in fact set up the testing program in issue in this case, and Mr. Paul Parobeck who is currently in charge of the MESA respirable dust laboratory in Pittsburgh.

Respirable dust does not consist of coal dust exclusively. It is coal mine dust which would include fine particles of coal as well as any other fine particles of rock or other dust that may be found in a coal mine. When a miner breathes the dust contained in the atmosphere of a coal mine, a certain portion of that dust is filtered out in the nose, trachea and bronchial areas of the respiration system and another portion is deposited in the lungs or pulmonary compartment. Years of study have shown that it is the larger particles that are filtered out or deposited on surfaces of the respiratory system before reaching the lungs. It is only those small particles that pass through the filtering system and are deposited in the lungs which will lead to the disease known as coal miner's pneumoconiosis and which are accordingly called respirable dust.

Some of the testimony concerning respirable dust referred to a Bureau of Mines information circular dated February, 1971, entitled *Sampling and Evaluating Respirable Coal Mine Dust* bearing the number IC8503. On page three of that document, there appears a graph which plots the diameter and density of the particles of coal mine dust against the percentage of penetration or deposition of such dust in the lungs, in a personal sampler device and in an MRE instrument. 5/ While it is not exactly clear from the graph itself, the solid line indicates the manner in which various sizes of dust are deposited in the lungs, the dashed line designated "AEC", (a development of the Atomic Energy Commission,) indicates the same information with respect to deposition in the personal respirable dust sampler, developed by the Bureau of Mines and the line consisting of both dashes and dots and designated "MRE" indicates the amount of dust deposited in an MRE Isleworth Gravometric Dust Sampler, which is referred to as the MRE instrument. So far as the two instruments are concerned, deposition as depicted by the graph, indicates that part of the coal mine dust which is deposited in the section of the instrument which is designed to be equivalent to the lungs, i.e. the filter. Both instruments contain areas which are designed to eliminate dust that would ordinarily be deposited in the nose, trachea or bronchial areas of the human respiration system. The two instruments do this filtering out of the larger non-respirable particles by taking

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5/ A copy of the referenced graph is designated Figure I.

advantage of the fact that if two spherical particles composed of the same substance are allowed to fall in an atmosphere, the larger particle will fall faster. This is because, as the size of spherical particles increase the cross-sectional diameter and therefore the air resistance is not increased to the same extent as the volume, (thus the mass of the particle) increases. In moving air, therefore, the larger particle will fall out sooner than the smaller particle. In the MRE instrument the air flow rate is such that the large particles fall out along the horizontal elutriator and only the smaller particles are deposited upon the filter which is later weighed. The air flow rate in this instrument is 2.5 liters per minute. It is obvious, that if the air flow in this instrument were increased, the larger particles would be deposited upon the filter whereas if it were decreased, particles normally reaching the filter might be deposited in the elutriator.

The personal sampler works on the same principle except that a cyclonic system is used to cause increased acceleration for the purpose of driving larger (i.e. heavier) particles to the outside of the circling atmosphere. The personal sampler must operate with an air flow of 2 liters per minute, and it is equally obvious that in this system an increase in the air flow will increase the G loads and thus cause the particles which might ordinarily reach the filter to drop out earlier, whereas too low an air flow would cause such larger, non-respirable particles to reach the filter. Any variation in the air flow in the two instruments therefore has the opposite effect. In one, increased air flow would cause an error of too small a particle being deposited on the filter whereas the same increased air flow in the other instrument would cause too large a particle to be deposited on the filter. The proper rate of air flow is thus extremely critical to both instruments.

Assuming both instruments are properly adjusted, the graph on page 3 of Information Circular 8503, [Figure I herein] shows that neither instrument collects on its filter, dust exactly corresponding to that collected by the lungs. The graph indicates that the MRE instrument will collect particles up to 7.1 microns in diameter whereas the personal sampler will collect particles up to 10 microns in diameter. While the graph is not exactly clear as to the pulmonary deposition, it appears to indicate deposition of particles up to somewhere between slightly over 6 microns and 7 microns in the lungs. There are other significant differences in the graphs. For example, both the personal sampler and the MRE instrument collect between 90 and 100 percent of the coal mine dust 2 microns in diameter whereas the lungs collect only

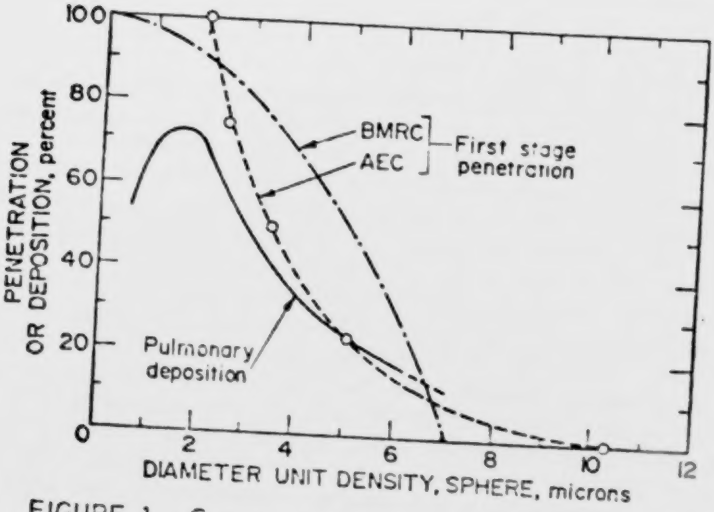

FIGURE 1. - Comparison of Respirable Size Criteria With Pulmonary Deposition Curve.

FIGURE I

somewhere between 70 and 75 percent of that size particle. The lungs collect only 54 percent of the particles that are a half micron in diameter whereas both instruments collect almost 100 percent of that size of particle. But it must be assumed that the Congress knew of the collection curves involved when it passed the Act and defined respirable dust as those particles of coal mine dust 5 microns or less in diameter. And, in the area between 5 micron particles and 2 micron particles the personal sampler curve is very close to the pulmonary curve. While the personal sampler does collect particles up to 10 microns in size, it collects a very small percentage of particles with a diameter in excess of 7 microns. The fact remains, however, that the instruments do collect particles larger than the statutory definition of respirable dust. 6/

From the aforementioned distribution curve, it appears that both the lungs and the personal sampler collect slightly more than 20 percent of the particles that are 5 microns in diameter. The personal sampler collects almost no particles that are 10 microns in diameter, and from observing the curve it would appear that the personal sampler collects approximately 10 percent of those particles between 5 microns in diameter and 10 microns in diameter. The fact that the personal sampler collects 10 percent of the dust that is larger than the statutory definition of respirable dust, however, does not mean that 10 percent of the dust collected by the sampler is too large to be considered respirable dust. It means that whatever quantity of that size particles is contained in the mine atmosphere, the personal sampler will collect 10 percent of that total quantity on its filter.

6/ The fact that in Section 202(e) of the Act it states "references to concentrations of respirable dust in this title means the average concentration of respirable dust if measured with an MRE instrument or such equivalent concentration as measured with another device approved by the Secretary of Health, Education and Welfare" does not mean that anything measured by an MRE instrument or another equivalent device would be respirable dust. While concentrations of such dust are to be measured in such instruments, there is no equivocation or uncertainty about the proscriptions of Section 318(k) which states in no uncertain terms "'respirable dust' means only dust particles 5 microns or less in size ..." (Underscoring supplied)

While there was no testimony on the point, it would seem reasonable that a slight increase in the air flow of the personal sampler would tend to prevent the larger particles of dust in excess of 5 microns in diameter from being deposited upon the filter. I must assume, however, that if such a simple solution would work, it would have been undertaken and that, therefore, any increase of air flow would affect the accuracy of the device in collecting the smaller particles of respirable dust. Also, it may be that rather than trying to approximate the human respiration system, the technicians should seek to devise an instrument which will measure and weigh only particles of dust 5 microns or less in diameter, but such a determination is not within the province of this hearing. We deal here with the devices as they exist, not as they might be.

The dust sampling procedure established by the Bureau of Mines has been described in Information Circulars 8484, 8520, and 8503, as well as in other publications of the Bureau of Mines and MESA. The testimony in this case agrees with the descriptions referred to and will only be explained herein in general terms. In general, the mine operator purchases cassettes for the purpose of measuring respirable dust from a manufacturer who has its cassettes and the empty filter weight data checked by the Bureau of Mines on a routine basis. The cassette has a serial number and a mine data card accompanying it has the same number. After the test has been run in the personal sampler the cassette and mine data card, filled out so far as required, are forwarded to the Pittsburgh testing laboratory.

The Pittsburgh testing laboratory is maintained under controlled temperature and humidity and at a pressure slightly higher than the surrounding areas so that there will be no dust drawn into the laboratory. The cassettes received from the mine operator are opened in the laboratory, and the mine data card and capsule containing the filter are placed on trays and the numbers on the card and capsule are checked. They are then desiccated i.e. dried, to remove any moisture that might otherwise affect the weight, and moved to an electronic balance where devices are placed to nullify any electrostatic effect that might distort the actual weight of the filter. The filter is weighed on the electronic balance and an operator notes the weight and writes it down on the mine data card. At that point the technician performing the weighing operation makes a mental calculation to determine if the weight gain, that is the difference between the recorded empty weight of the filter and the weight of the filter with the dust particles deposited thereon, is greater than 6 milligrams.

If it is, the sample is put aside for testing for oversize particles, but if there is a weight gain of 6 milligrams or less, the sample is discarded and destroyed. No record is kept on the mine card or anywhere else as to which of a number of technicians made the actual weighing on any particular sample. After the weighing, the results are punched out on a keypunch teletype system by one operator and then a different person keypunches the same data again. The system is such that if the two operators do not punch out exactly the same data, an automatic notification is given so that the operators can check to see if one or the other made an error in transcribing the information from the mine data card. The data punched into the system, goes directly to the computer in Denver, Colorado which, at a later date, determines if any 10 consecutive valid samples comply or do not comply with the standard in effect.

Throughout this procedure, at several places, the mine data card and filter identification numbers are checked. But there was at the time of the violations involved in this case, no double check of the visual weight display observed by the person operating the balance. At a later time, subsequent to Mr. Parobeck's deposition (Respondent's Exhibit 14) but prior to the hearing, a spot check system was instituted whereby a certain number of these weighings were later duplicated by a different operator on a random basis to see if a discrepancy had occurred.

The testimony indicated that the decision to check filters showing a weight gain greater than 6 milligrams was an arbitrary decision not based on any particular studies. With respect to those capsules, showing the 6 milligram weight gain, first they are examined to see if oversized particles appear visually without the aid of a microscope. It such particles appear the sample is voided. If they do not appear, however, the filter is examined under a microscope with various sections of the filter designated as fields. It is not stated in the testimony the exact size of a field, but 10 of these fields are examined and the sample is voided if these 10 fields each show three or more particles that are in excess of 10 microns in size. Mr. Parobeck's testimony made it clear that if nine of these fields all show more than 3 particles in excess of 10 microns but the 10th field did not show such particles, the sample would not be voided. It is thus fairly clear that in addition to the particles over 5 microns in diameter, particles in excess of 10 microns in diameter and thus also not respirable are counted against a Respondent whether the sample weight gain is more than 6 milligrams or less than 6 milligrams since no test is taken regarding the weight gains of less than 6 milligrams. 7/

In the Castle Valley case, supra, the Board of Mine Operations Appeals stated that a notice of non-compliance which is a computer print-out from the Denver computer, is prima facie evidence of a violation which can be rebutted. The Board indicated that in view of the discovery procedures available to a Respondent, he could challenge any notice of non-compliance that might be issued. As testimony has indicated in this case, however, discovery techniques will help a Respondent very little in determining whether or not his sample was actually tested properly. It is clear that he cannot discover who made the actual weighing, he cannot test the sample prior to sending it in because it would then be voided for tampering, and he cannot send in experts to test his sample after it has shown a greater than 3 milligrams result. There is in effect absolutely nothing a Respondent can do to defend itself if the computer print-out shows that it is in violation of the respirable dust standard.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FEB 13 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. CENT 79-92-M A/O No. 41-01163-05002
v.	:	
GENERAL PORTLAND, INC., Respondent	:	Plant 53 Seagoville

DECISION APPROVING SETTLEMENT

The Solicitor has filed a motion to approve a settlement in the above-captioned proceeding.

Citation No. 153605 was issued when a back-up alarm on a bulldozer was found to be inoperative, a violation of 30 CFR 56.9-2. The assessed penalty was $72 and the recommended settlement is $40. In support of the recommended settlement, the Solicitor states that there was little operator negligence as the violation could not have been reasonably predicted. The Solicitor gives no basis for this representation. In the future the Solicitor should give reasons. Bare conclusions will not suffice. The Solicitor also states that the probability of injury was over-evaluated since very few employees were exposed to the risk, they were not exposed to the risk with any great frequency and they were not working in a situation where their attention would be distracted. I accept the Solicitor's representations and on the basis of low gravity conclude that the recommended settlement should be approved. The Solicitor further advises that respondent has already paid the $40 penalty sought by MSHA.

ORDER

The recommended settlement is hereby APPROVED.

Paul Merlin

Paul Merlin
Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 13 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	Civil Penalty Proceeding Docket No. LAKE 79-109 A/O No. 33-01357-03003
v.	
BUCKEYE COAL MINING COMPANY, INC., Respondent	West Point Strip Mine

DECISION APPROVING SETTLEMENTS

ORDER TO PAY

The Solicitor has filed a motion to approve settlements in the above-captioned proceeding.

Citation No. 273083 was issued for a failure to conduct noise level surveys at six month intervals, as required by 30 CFR 71.303(a). The original assessment was $150 and the recommended settlement is $52. In support of her motion, the Solicitor states that both operator negligence and gravity had been overassessed: the operator's safety director thought he had conducted the survey, and the probability of occurrence was improbable as previous surveys had demonstrated no excessive noise exposures. I accept the Solicitor's representations, which indicate a low level of negligence and a lack of gravity. Accordingly, the recommended settlement is hereby approved.

Citation No. 784608 was issued when a portable fire extinguisher was found to be unusable and inoperative, a violation of 30 CFR 77.1110. The original assessment was $34 and the recommended settlement is $25. In support of her motion, the Solicitor states that the probability of injury was minimal as there were other fire extinguishers present in the area. I accept the Solicitor's representations. Accordingly, the recommended settlement is hereby approved. I would however, note that the original assessment was low. I cannot understand why the Solicitor would agree to any reduction. However, the difference involved is so small that further expenditure of the taxpayers' money on this matter is not justified.

The Solicitor further states that Citation Nos. 784606 and 784607 have been settled for the original amounts of $48 and $66, respectively. However, she gives no reasons for the recommended settlements. Proceedings before the Commission are de novo, and a sufficient basis must be provided for the approval of all settlements. Rather than disapprove these settlements, I have reviewed the citations, the assessment sheets and the inspector's statements. Based upon my own review of the violations, I conclude the recommended settlements are consistent with and will effectuate the purposes of the Act. The recommended settlements are therefore, approved. In the future, however the Solicitor should given reasons.

ORDER

The operator is ORDERED to pay $191 within 30 days from the date of this decision.

Paul Merlin

Paul Merlin
Assistant Chief Administrative Law Judge

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(703) 756-6210/11/12

FEB 13 1980

STEVE SHAPIRO, Complainant	:	Complaint of Discharge, Discrimination and Interference
v.	:	
	:	Docket No. WEVA 79-238-D
BISHOP COAL COMPANY, Respondent	:	Docket No. WEVA 79-445-D
	:	
SECRETARY OF LABOR, ON BEHALF OF STEVE SHAPIRO, Complainant	:	Bishop No. 34 Mine
v.	:	
CONSOLIDATION COAL COMPANY (BISHOP COAL COMPANY), Respondent	:	

DECISIONS APPROVING SETTLEMENT

Appearances: Barbara K. Kaufmann and Kenneth Stein, Esqs., Office of the Regional Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Complainants; Kendrick King, UMWA, District #29, Beckley, West Virginia, for complainant Steve Shapiro; Samuel P. Skeen, Esq., Pittsburgh, Pennsylvania, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern discrimination complaints filed by the complainants against the respondent pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. A hearing was conducted in Charleston, West Virginia during the term October 23-24, 1979, to commence again at a time and place convenient to the parties. Subsequently, complainant MSHA advised me by letter dated January 18, 1980, that the parties had reached a settlement in the cases and that a motion to withdraw the complaints would be forthcoming for my review and consideration.

By motion filed February 7, 1980, MSHA moves to withdraw its discrimination complaint on the ground that the parties have agreed to settle the matter and that the terms of the agreement finalizing the settlement are satisfactory to all concerned, including Mr. Shapiro, and that both the operator and Mr. Shapiro have signed and executed the settlement agreement, a copy of which as been submitted for the record.

Under the terms of the agreement respondent agrees that it will not discharge or in any manner discriminate against or interfere with any miner, representative of miners, or applicants for employment subject to the Act because of their engaging in activities protected by the Act or in the exercise of any rights granted to them under the Act, including the making of health or safety complaints to the respondent or to MSHA or the filing of charges with MSHA. Further, respondent agrees to immediately post on the mine bulletin board, or in a conspicuous place where notices to employees are customarily posted and maintained for a period of 60 consecutive days from the date of posting, the notice setting forth the terms of the settlement agreement between the respondent and Mr. Shapiro.

Discussion

Commission Rule 30, 29 CFR 2700.30, requires Commission approval for proposed civil penalty cases which have been contested but subsequently settled. Although the instant cases are complaints of discrimination filed pursuant to section 105(c)(2), MSHA's claims for relief included a proposal for assessment of an appropriate civil penalty in the event it prevailed on its discrimination claim. Accordingly, I believe that any proposed settlement in cases of this kind require a Judge's approval pursuant to rule 30. See, Secretary of Labor (MSHA) and John Koerner v. Arch Mineral Coal Company, DENV 78-564, March 9, 1979, a discrimination case decided by now retired Judge Littlefield on February 7, 1979. Judge Littlefield approved a settlement entered into by the parties on the ground that "the parties have successfully negotiated a settlement on all matters formally in issue", and he vacated a reinstatement order previously entered in the case. On review, the Commission remanded the case to the Judge in order to supplement the record with (1) the terms of the settlement and (2) to document the fact that the employee agreed to or otherwise acquiesced in the negotiated settlement. Further, in a recent case decided by Judge Steffey on January 8, 1980, MSHA and James Blevins, et al., v. Cedar Creek Coal Corporation, VA 79-55-D, he approved a discrimination case settlement and permitted withdrawal of the complaint on the basis of his findings that all of the affected miners signed the agreement and that it reflected a reasonable resolution of all issues presented in the proceedings.

Conclusion

After full consideration of the record adduced in these proceedings, including the transcripts of the testimony presented by the witnesses who testified in the two-day hearing session of October 23 and 24, 1979, and the settlement agreement entered into by the parties, I conclude that the proposed disposition of these proceedings is in the public interest and should be approved. It seems clear to me that both Mr. Shapiro and the respondent are satisfied with the agreed upon disposition of the complaints which were filed in these proceedings, and that the Secretary is in accord with the agreement. Accordingly, pursuant to 29 CFR 2700.30, the settlement is approved, and MSHA's motion to withdraw and dismiss is granted.

Order

Respondent is ordered to comply forthwith with the terms of the settlement as set forth above and to post the notice of the agreement as agreed. Upon compliance, these proceedings are dismissed.

George A. Koutras

George A. Koutras
Administrative Law Judge

Distribution:

Kendrick King, General Counsel, District 29, U.M.W.A. Box 511, Beckley, WV 25801 (Certified Mail)

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Steve Shapiro, P.O. Box 137, Newhall, WV 24866 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
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FALLS CHURCH, VIRGINIA 22041

(703) 756-6225

FEB 14 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	Civil Penalty Proceeding Docket No. KENT 79-39 A.O. No. 15-11014-03002
v.	Mine: Freedom No. 1 Surface
H & H COAL COMPANY, Respondent	

DECISION

Pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), the Secretary of Labor petitioned for the assessment of a civil penalty. A hearing was held on January 9, 1980 in Louisville, Kentucky.

The parties stipulated and I find:

1. Respondent, H & H Coal Company, is subject to the Act's jurisdiction, is a small operator, and operates Freedom No. 1 Surface.

2. I have jurisdiction over this case.

3. On November 20, 1978, Earl T. Leisure, a duly authorized MSHA representative, inspected Freedom No. 1 Surface and properly issued the citation in question.

4. Exhibit P-1 accurately reflects Respondent's history of previous violations.

5. Any penalty that I assess will not adversely affect Respondent's ability to continue in business.

6. Respondent acted in good faith in connection with this matter.

At the conclusion of the hearing, the parties waived the filing of written briefs, proposed findings of fact, and conclusions of law and I rendered the following decision from the bench:

> Petitioner alleged that pursuant to Section 110 of the Act a civil penalty should be assessed against Respondent for violating the Safety Standard at 30 CFR 77.404(a).

That Standard reads "mobile and stationary machinery and equipment shall be maintained in safe operating condition, and machinery or equipment in unsafe condition shall be removed from service immediately."

Petitioner contends that in permitting a vehicle, which was used for drilling to be operated with its front, rear and side windows removed, Respondent did not maintain that vehicle in a safe condition in that the vehicle's driver could have been injured by the sharp edges of the window frames and by dust or the debris flying back from the drill to the front window opening. I agree.

I find that the operation of this vehicle without windows constituted an unsafe operating condition, and this violated the Standard at 30 CFR 77.404.

I find that there was some danger of the driver being struck by dust and/or debris that might come into the front of the vehicle through the front window opening. A window would have protected the driver against this danger.

To a lesser extent, there was possible danger from the windows' edges.

There is some dispute as to the sharpness of the edges in and about the window frames, and in view of the fact that the vehicle moved slowly and the driver generally kept his hands on the controls, this danger was slight.

There was little negligence involved since the violation was based upon an interpretation of the regulation, which the operator legitimately disagreed with and of which the operator had no advance notice.

In consideration of the above, as well as the other criteria under Section 110(i), including H & H's rapid compliance and good faith and its efforts to prevent repetition of this violation, I assess a penalty of $15 against the operator for this violation.

Accordingly, it is ordered that H & H Coal Company pay a penalty of $15 on or before 30 days after it receives a copy of my signed decision and Order in this matter.

The bench decision is AFFIRMED.

ORDER

Respondent is ORDERED to pay $15.00 in penalties within 30 days after receipt of this Order.

Edwin S. Bernstein

Edwin S. Bernstein
Administrative Law Judge

Distribution:

George Drumming, Jr., Attorney, Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Byron W. Terry, Safety Director, The Hoke Company, Inc, Box 61, Cromwell, KY 42333 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SKYLINE TOWERS NO. 2, 10TH FLOOR
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FEB 14 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
v.	:	Docket No. KENT 79-124 A.O. No. 15-10364-03003
GOLDEN R COAL COMPANY, Respondent	:	Mine: Prep Plant

DECISION

Pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), the Secretary of Labor petitioned for the assessment of a civil penalty. Petitioner alleged that Respondent violated the mandatory safety standard at 30 CFR § 77.1707(b), which reads:

> The first aid equipment required to be maintained under the provisions of paragraph (a) of this section shall include at least the following:
>
> (1) One stretcher;
>
> (2) One broken-back board (if a splint-stretcher combination is used it will satisfy the requirements of both subparagraph (1) of this paragraph and this subparagraph (2));
>
> (3) Twenty-four triangular bandages (15 if a splint-stretcher combination is used);
>
> (4) Eight 4-inch bandage compresses;
>
> (5) Eight 2-inch bandage compresses;
>
> (6) Twelve 1-inch adhesive compresses;
>
> (7) An approved burn remedy;
>
> (8) Two cloth blankets;
>
> (9) One rubber blanket or equivalent substitute;
>
> (10) Two tourniquets;

> (11) One 1-ounce bottle of aromatic spirits of ammonia or 1 dozen ammonia ampules; and,
>
> (12) The necessary complements of arm and leg splints or two each inflatable plastic arm and leg splints.

Paragraph (a) reads:

> Each operator of a surface coal mine shall maintain a supply of the first aid equipment set forth in paragraph (b) of this section at or near each working place where coal is being mined, at each preparation plant and at shops and other surface installation where ten or more persons are regularly employed.

A hearing was held on January 9, 1980, in Louisville, Kentucky. The issues are whether Respondent violated the standard and, if so, the appropriate civil penalty to be assessed, based upon the six criteria in Section 110(i) of the Act. At the hearing, Earl T. Leisure, the MSHA inspector who issued the citation, testified for Petitioner and Byron W. Terry, Respondent's safety director, testified for Respondent.

The parties stipulated, and I find:

1. Respondent, Golden R Coal Company, is subject to the jurisdiction of the Act.

2. Respondent operates a coal preparation plant called the "Prep Plant."

3. Earl T. Leisure is a duly authorized representative of the Mine Safety and Health Administration, and in his official capacity inspected the "Prep Plant" on September 18, 1978.

4. Respondent was properly issued the citation in question.

5. Respondent is a small operator.

6. Any penalty which I assess will not adversely affect Respondent's ability to continue in business.

7. The certified computer printout marked as Exhibit P-1 reflected an accurate history of previous violations.

Mr. Leisure testified that on September 18, 1978, he inspected the Prep Plant, accompanied by Respondent's plant manager, Larry Gwinn. During this inspection, Mr. Leisure discovered that the plant's first-aid kit was missing certain items which are required by the standard. The missing items included one broken back board, 21 triangular bandages, three 4-inch bandage compresses, 12 1-inch adhesive compresses, an approved burn remedy, two cloth blankets, and one tourniquet. Mr. Leisure stated that the missing items represented more than half of the required contents of the kit, and that in his opinion, they were "major items as opposed to small items." Although Mr. Leisure felt that Mr. Gwinn should have known of these shortages, he also felt that Respondent exercised good faith in rapidly abating the condition. The abatement notice, which was issued by another inspector, stated that the Prep Plant later procured a complete first-aid kit.

Mr. Terry testified that the operator read Section 77.1707(a) as requiring a full first-aid kit (*i.e.*, one meeting all the requirements of Section 77.1707(b)) only at preparation plants where 10 or more persons are regularly employed. He stated that only three people were working at the Prep Plant at the time of the alleged violation. With respect to specific shortages in the Prep Plant's equipment on the day in question, Mr. Terry stated that additional blankets were available at the owner's house, which was 120 yards from the plant. The absence of a stretcher or broken back board was explained by the close proximity of ambulance service in Morgantown, Kentucky, which was apparently 5 to 10 minutes from the plant. On cross-examination, however, Mr. Terry admitted that if the standard applied to the Prep Plant, the availability of ambulance service did not provide the type of protection that compliance with the standard would. Finally, Mr. Terry stated that after the citation was issued, plant employees drove 89 miles to obtain a full first-aid kit, and that the kit was in the plant office the morning after the citation was issued.

The parties filed posthearing submissions directed to Respondent's argument that the requirements of Section 77.1707(b) do not apply to preparation plants employing less than 10 persons. Petitioner argues that Section 77.1707(a) designates working places and preparation plants specifically with the use of the word "each," while "shops and other surface installation(s)" are only generally designated. Thus, in Petitioner's view, the "10 or more persons" requirement relates back only to shops and other surface installations.

Respondent argued that the comma after the word "mined" in Section 77.1707(a) was intended to divide the sentence into those installations where a first-aid kit would be required regardless of the number of employees at the facility, and those installations where a kit would be required only if 10 or more persons were regularly employed.

I commend both parties on their arguments concerning the interpretation of a standard which is, admittedly, drafted in an ambiguous and confusing manner. However, on balance, I believe that Petitioner's interpretation is more persuasive. In reaching this conclusion, I am guided not only by the wording of the regulation, but by the Act's underlying remedial purposes.

As a general proposition, rules of statutory construction can be employed in the interpretation of administrative regulations. *See* C. D. Sands, 1A *Sutherland Statutory Construction*, § 31.06, p. 362 (1972). According to 2 Am. Jur. 2d, *Administrative Law*, § 307 (1962), "rules made in the exercise of a power delegated by statute should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason."

Section 2 of the 1977 Mine Act attests to the statute's remedial purpose as follows:

> SEC. 2 Congress declares that--
>
> (a) the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource--the miner;
>
> (b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines cause grief and suffering to the miners and to their families;
>
> (c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;
>
> (d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated;
>
> (e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;
>
> (f) the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce; and
>
> (g) it is the purpose of this Act (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health, Education, and Welfare and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal or other mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal or other mining industry, research and development and training programs

> aimed at preventing coal or other mine accidents and occupationally caused diseases in the industry.

Remedial legislation such as the 1977 Mine Act must be interpreted in light of the express Congressional purpose of providing a safe work environment, and the regulations promulgated pursuant to such legislation must be construed to effectuate Congress' goal of accident prevention. Brennen v. Occupational Safety and Health Review Commission, 491 F.2d 1340, 1343 (2d Cir. 1974). "Should a conflict develop between a statutory interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise of safety, the first should be preferred." District 6, UMWA v. Department of the Interior Board of Mine Operations Appeals, 562 F.2d 1260, 1265 (D.C. Cir. 1972).

Turning to the regulation itself, I do not agree with Respondent's contention that the comma after the word "mined" was intended to substantively separate the sentence so as to include preparation plants in the "10-person" limit. If such a meaning had been intended, I believe that the word "and" would have been placed after the word "mined", rather than after "preparation plant." I find Petitioner's argument concerning the use of the word "each" before "working place" and "preparation plant," but not before "shops and other surface installation(s)" to be more convincing. Accordingly, I find that Respondent violated 30 CFR § 77.1707(b).

However, I do not agree with the Assessment Office's proposed penalty of $98. The language of this regulation is so unclear that it did not provide this operator with adequate notice of its meaning. Therefore, I assess a penalty of $10.

ORDER

Respondent is ORDERED to pay $10 in penalties within 30 days of the date of its receipt of this Order.

Edwin S. Bernstein
Administrative Law Judge

Distribution:

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Byron W. Terry, Safety Director, Golden R Coal Company, R.R. No. 1, Cromwell, KY 42333 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 14 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 79-138
Petitioner : A.O. No. 15-11129-03003
v. :
: Mine: Land Fill Strip
THE HOKE COMPANY, INC. :
Respondent :

DECISION

Pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), the Secretary of Labor petitioned for the assessment of civil penalties for six citations issued to Respondent. A hearing was held on January 9, 1980, in Louisville, Kentucky.

The parties stipulated and I find:

1. Respondent, The Hoke Company, Inc., is subject to the Act's jurisdiction, is a small operator, and operates the surface coal mine designated as "Land Fill Strip."

2. On January 16, 1979, Earl T. Leisure, a duly authorized MSHA representative, inspected Land Fill Strip and properly issued the citations in question.

3. Exhibit P-1 accurately reflects Respondent's history of previous violations.

4. Any penalty that I assess will not adversely affect Respondent's ability to continue in business.

After submitting evidence, the parties waived filing briefs and proposed findings of fact and conclusions of law and I issued the following decisions from the bench.

Citation No. 399161

The violation, alleged under the Section 110 of the Act, is of 30 CFR § 77.410, which reads: "Mobile equipment such as trucks, forklifts, front-end loaders, tractors and graders shall be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse."

It is undisputed that Respondent violated that safety provision, and I so find.

There was a high degree of negligence. Knowing that the backup alarm on the vehicle was disabled, Respondent operated the vehicle. This constituted a willful violation of the standard.

The gravity was moderate. No one was in the area, according to Mr. Terry's testimony and the testimony of Mr. Leisure.

As Mr. Leisure testified, it is difficult to see behind this vehicle. The vehicle was in reverse at least 50 percent of the time, and the vehicle is extremely heavy, many tons in weight. Therefore, the risk of death or serious injury as a result of this violation can be quite great. Because of this violation and the negligence involved, sufficient penalty to encourage future voluntary compliance is required. However, taking into consideration the fact that the operator is a small operator and exercised good faith efforts to correct the condition, in this case, I assess a penalty of $200. But for these factors, I would assess a larger penalty, and I would expect that the next time such a violation occurs, given this type of factual situation by this operator, the penalty would be larger.

Citation No. 399162

This citation involves an alleged violation of 30 CFR § 77.404(a), which reads: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

Petitioner contends that in operating this truck with its muffler and tailpipe missing, Respondent exposed the occupants of that truck to the danger of being seriously injured by carbon monoxide fumes.

I find that Respondent was in violation of that provision. There was a fair degree of negligence. Respondent knowingly violated that provision.

The gravity was moderate. It was wintertime. There was a danger of the operators of that vehicle keeping the windows closed and of the fumes poisoning the occupants. However, there is no evidence that on this occasion the windows were rolled up.

This is a small operator, and the evidence is that the operator did achieve prompt compliance. Therefore, I find the amount of the penalty warranted for this violation in order to encourage voluntary compliance is $125.

Citation No. 399163

I find that by not providing this explosive truck with a working horn, Respondent violated several safety standards of this Act.

In my opinion, Respondent violated all three standards that were discussed.

It was a violation of 30 CFR § 77.404(a) which reads: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

This was mobile machinery or equipment. A working horn is a requirement of operating a vehicle in a safe operating condition. In not having a working horn, Respondent violated that safety provision.

A similar violation occurred with respect to 30 CFR § 77.1302(b), which reads: "Vehicles containing explosives or detonators shall be maintained in good condition and shall be operated at a safe speed and in accordance with all safe operating practices."

In not having a working horn, this vehicle was not maintained in good condition.

Finally, although I agree with Mr. Terry that there is some question as to the applicability of the Section, 30 CFR § 77.1605(d), I agree that of the three sections, this may be the least applicable. I find that the language in this section is sufficiently broad to apply.

Therefore, I find a violation. I find moderate gravity. A horn is an important safety device in a vehicle of this kind. There is a question as to the degree of negligence. There is no evidence that the supervisory personnel of Respondent knew of this condition before the inspector discovered it, although there is some hearsay evidence that a driver stated that the condition existed for quite some time.

There was good faith compliance, and this is a small operator. As I have indicated, I consider these standards to be quite important. I assess a penalty of $65, which I hope would be sufficient enough to encourage voluntary compliance of these standards on the part of the operator in the future.

Citation No. 399164

In view of what I have heard and upon consideration of the six criteria set forth in Section 110(i) of the Act, I will approve the settlement proposed by the parties and I will assess a penalty of $84 for Citation No. 399164.

Citation No. 399165

After hearing the testimony of the witness and upon consideration of the six criteria set forth in Section 110(a) of the Act, I will approve the proposed settlement and I will approve the assessment. I will assess a penalty of $106 for the violation in Citation No. 399165.

Citation No. 399200

The citation involves an alleged violation of the mandatory standard at 30 CFR § 77.1109(c)(1), which reads: "Mobile equipment, including trucks, front-end loaders, bulldozers, portable welding units, and augers, shall be equipped with at least one portable fire extinguisher."

The undisputed testimony of Mr. Leisure is that at the time of his inspection, the Caterpillar D9E tractor did not have a portable fire extinguisher. Therefore, Respondent violated the safety standard.

The operator was negligent in that this condition was readily observable. The extinguisher was reasonably large. It would have been a bright color, and it was the type of item that could have been noted upon an inspection.

The fact that there is no evidence that the officials in charge of the mine knew that the extinguisher was not on the vehicle does not nullify the fact that they should have or could have known upon inspection that the extinguisher was not on the vehicle.

A lack of an extinguisher could have caused serious injury to the driver of the vehicle in the event of a fire.

The gravity of the violation is somewhat mitigated by the fact that, as testified to by Mr. Terry, there were other extinguishers nearby. However, the regulation does require an extinguisher on each vehicle.

There was good faith correction by the operator, and this is a small operator.

I therefore assess a penalty for this violation in an amount of $65, which I hope would be high enough to deter further violations of this kind and assure voluntary compliance of this Standard by the mine operator.

I affirm these six bench decisions.

Summary

The following table summarizes the citation numbers, the amounts originally proposed by the Assessment Office, and the final assessments to be paid by Respondent:

Citation No.	Proposed Assessment	Final Assessment
399161	$ 72.00	$200.00
399162	$106.00	$125.00
399163	$ 48.00	$ 65.00
399164	$ 84.00	$ 84.00
399165	$106.00	$106.00
399200	$ 40.00	$ 65.00

ORDER

Respondent is ORDERED to pay $645.00 in penalties within 30 days after its receipt of this Order.

Edwin S. Bernstein
Administrative Law Judge

Distribution:

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Byron W. Terry, Safety Director, The Hoke Company, Inc., Box 61, Cromwell, KY 42333 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 14 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	Civil Penalty Proceeding Docket No. LAKE 79-53 Assessment Control No. 11-00614-03007
v.	
SOUTHWESTERN ILLINOIS COAL CORPORATION, Respondent	Streamline Strip Mine

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Brent L. Motchan, Esq., St. Louis, Missouri, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to written notice dated September 4, 1979, a hearing in the above-entitled proceeding was held on October 10, 1979, in St. Louis, Missouri, under section 105(d) of the Federal Mine Safety and Health Act of 1977.

MSHA's Petition for Assessment of Civil Penalty was filed in Docket No. LAKE 79-53 on May 14, 1979, seeking assessment of a civil penalty for an alleged violation of 30 CFR 77.1710(a).

Issues

Simultaneous posthearing briefs were filed on December 13, 1979, by counsel for MSHA and Southwestern Illinois Coal Corporation. The briefs raise the issues of (1) whether a violation of section 77.1710(a) occurred and, if so, what civil penalty should be assessed based on the six criteria set forth in section 110(i) of the Act and (2) whether Southwestern Illinois Coal Corporation should be required to pay a civil penalty for an alleged violation which was committed by an independent contractor.

Findings of Fact

My decision in this proceeding will be based on the findings of fact set forth below:

1. Southwestern Illinois Coal Corporation operates the Streamline Strip Mine which is located in Randolph County, Illinois. The mine employs 176 miners to produce about 5,600 tons of coal per day from the Illinois No. 6 coal seam which is 72 inches thick (Exh. 1, p. 3). Southwestern is controlled by Arch Mineral Corporation whose total annual coal production for the year 1978 was 7,783,693 tons. Ashland Oil Incorporated owns a 48.9-percent interest in Arch Mineral Corporation (Exh. 1, pp. 1 & 2).

2. Southwestern Illinois Coal Corporation, hereinafter referred to as the operator, entered into a contract dated June 22, 1977, with Darryll Waggle Construction, Inc., hereinafter referred to as Waggle. Under the contract, Waggle agreed to assemble and erect a Model No. 8200 Marion Dragline at the operator's Streamline Mine in accordance with blueprints and other specifications to be provided by the operator. The operator reserved the right to make changes in the drawings and specifications. Waggle was obligated to provide all labor and supervision and all tools except that the operator agreed to provide all welding machines, torches, grinders, air motors, and derrick or crawler cranes (Operator's Br., Exh. 1, pp. 1-3).

3. Waggle was obligated under the contract to provide a competent foreman or superintendent, satisfactory to the operator, at the site of the work at all times and Waggle was obligated under the contract to enforce strict discipline and good order among its employees (Op. Br., Exh. 1, p. 3). The contract provided that Waggle should complete the assembly and erection of the dragline within a period of 14 months after sufficient material had been received at the erection site for work to begin. The operator agreed to provide (1) a graded and drained erection site at the Streamline Mine, (2) an all-weather access road to the erection site, and (3) a railroad spur and unloading area for unloading dragline components, other equipment, and supplies (Op. Br., Exh. 1, pp. 4 & 5). Waggle was obligated under the contract to perform all work on a "cost-plus" basis and the operator reserved the right to inspect, audit, and make photocopies of all of Waggle's records (Op. Br., Exh. 1, p. 7). Under the contract, Waggle could not subcontract any work without obtaining the operator's express permission in writing (Op. Br., Exh. 1, p. 9). Waggle was obligated under the contract to reimburse the operator for any claims, damages, or lawsuits arising from the assembly of the dragline, including any claims or expenses arising under the Federal Coal Mine Health and Safety Act of 1969, as amended (Op. Br., Exh. 1, p. 10). Waggle was obligated under the contract to take all necessary precautions for the safety of employees and to comply with all applicable provisions of Federal, State, and local safety laws and building codes to prevent accidents or injuries to persons on or about or adjacent to the premises where the work was being performed (Op. Br., Exh. 1, p. 12).

4. An MSHA inspector on January 9, 1979, went to the operator's Streamline Mine and advised the operator's safety director, Mr. Allan Byrd, that he would be making an inspection at the site where Waggle was assembling the Marion dragline (Tr. 9). The inspector then went to the construction site office where he examined Waggle's preshift and accident reports. The inspector was accompanied on his examination of the construction site by

Waggle's safety representative, Mr. Sam Higgerson, and the UMWA's safety representative (Tr. 10).

5. When the inspector was about 40 feet northwest of the dragline, he observed two of Waggle's employees at a point about midway of the boom. When the inspector first saw the workmen, they were about 220 feet from him. It appeared to the inspector that one of the employees was cutting metal with an oxygen-acetylene torch while the other watched or assisted in the cutting operation. The inspector started walking toward the men to determine whether they were wearing safety goggles. The man who was doing the actual cutting was wearing goggles, but the man who was watching the cutting operation was not wearing goggles. When the inspector was between 100 and 10 feet from the men, he calculated that the face of the man without goggles was within 2-1/2 feet of the cutting torch. The workmen did not realize that the inspector was in their vicinity until he was about 10 feet from them. At that time, they stopped working and turned to face the inspector (Tr. 12; 29; 55; 63; 86; Exhs. B and C).

6. The inspector learned from Waggle's construction site representative that the name of the workman who was observing the cutting process was Mr. Doug Hepp. The inspector advised Mr. Higgerson, Waggle's safety representative, that Mr. Hepp was in violation of section 77.1710(a) which provides "[p]rotective clothing or equipment and face-shields or goggles shall be worn when welding, cutting, or working with molten metal or when other hazards to the eyes exist." The inspector wrote Citation No. 771428 at 11:30 a.m., citing the operator for a violation of section 77.1710(a) because (Tr. 12; Exh. 2):

> Doug Hepp, a classified welder, was observed assisting another welder in cutting out pieces of metal from a section of 1-1/2" plate. Mr. Hepp's eyes were within 2-1/2 feet from the cutting tip and he was not wearing any eye protection. The violation occurred in the boom area of the 8200 Dragline on the construction site. Mr. Hepp was under the supervision of Ralph Gaither.

7. Although Mr. Hepp testified that he keeps goggles in his tool box and wears them when he is cutting with a torch, it was necessary for Mr. Hepp to go to the welding shanty and procure a pair of goggles after he was cited by the inspector for not wearing them (Tr. 80-81). Both Mr. Horton, who was doing the cutting when Citation No. 771428 was written, and Mr. Hepp testified that Mr. Hepp was standing behind Mr. Horton while metal was being cut (Tr. 68; 76). Waggle provided the goggles used by its workers and Waggle always had plenty of goggles at the construction site (Tr. 81-82).

8. A master mechanic employed by the operator presented a diagram of a Model 8200 Marion dragline and testified that, in his opinion, it would have been difficult for the inspector to have determined from a distance of approximately 220 feet that Mr. Hepp's face was within 2-1/2 feet of

the tip of the cutting torch (Tr. 63). The master mechanic also testified that there were two buildings in the general area where the inspector was standing at the time he claims to have seen Messrs. Horton and Hepp working. The master mechanic expressed the opinion that the two buildings might also have obstructed the inspector's view of the place where Messrs. Horton and Hepp were working (Tr. 63). The master mechanic, however, was not present when the inspector made the investigation which resulted in the issuance of Citation No. 771428 (Tr. 66). Messrs. Horton and Hepp also expressed a belief that the inspector would not have been able to tell how close Mr. Hepp was to the cutting torch when the inspector was 220 feet from the cutting operation (Tr. 69; 77).

9. The inspector gave Waggle a period of 5 minutes within which to abate the violation of section 77.1710(a) and the violation was abated within the time allowed. Therefore, the inspector was of the opinion that the operator had shown a good faith effort to achieve rapid compliance (Tr. 19; Exh. 2).

10. The danger associated with Mr. Hepp's failure to wear goggles lies in the fact that a piece of molten metal could have flown up from the cutting torch and could have caused a serious eye injury (Tr. 15). The inspector believed that the operator had tried to the best of its ability to get all employees to wear protective eyewear (Tr. 17-18).

11. The inspector stated that it was MSHA's policy to cite the operator for violations attributable to work performed for an operator by an independent contractor. At the time the inspector wrote Citation No. 771428, he was solely concerned with bringing about compliance with section 77.1710(a) rather than with a question of whether he should have written the citation in the name of Waggle, instead of the operator of the Streamline Mine (Tr. 42-43). The inspector was aware of the fact that the Secretary has published some proposed regulations governing the issuance of citations or orders in the name of independent contractors and he recognized that MSHA's policy of citing the operator for violations committed by independent contractors might have to be revised after the regulations have been finalized (Tr. 49).

The Issue of Whether the Operator or Waggle Should Have Been Cited

In its brief (pp. 6-7), the operator correctly notes that all of the persons working at the construction site were employees of Waggle except for a construction superintendent who was employed by the operator to make sure that Waggle was conforming with the operator's blueprints and specifications for assembly of the dragline. The operator argues that Waggle was in the best position to control health and safety matters and that there is no justification to allow MSHA to carry out its policy of administrative convenience in citing operators rather than independent contractors who are in actuality responsible for violations.

MSHA's brief (pp. 9-10) appropriately cites the inspector's statement that he had issued the citation in the name of the operator because it was

MSHA's policy to cite operators for violations committed by an independent contractor's employees pending such time as the Secretary finalizes his proposed regulations governing the procedures to be used for citing independent contractors (Finding No. 11, supra).

The Commission has so far upheld MSHA in citing operators for violations committed by independent contractors (Secretary of Labor v. Republic Steel Corporation, 1 FMSHRC 5; Secretary of Labor v. Kaiser Steel Corporation, 1 FMSHRC 343; Secretary of Labor v. Consolidation Coal Company, 1 FMSHRC 347; Secretary of Labor v. Old Ben Coal Company, 1 FMSHRC 1480; and Secretary of Labor v. Monterey Coal Company, 1 FMSHRC 1781). In the Old Ben case the Commission noted, however, that MSHA's policy of citing operators for independent contractors' violations should be an interim policy and that if MSHA unduly prolongs that interim policy, intead of implementing direct enforcement procedures against the independent contractors, MSHA "* * * will be disregarding the intent of Congress" (1 FMSHRC at 1486).

The Commission's decision in the Old Ben case, supra, was not issued until 20 days after the hearing in this proceeding was completed. In the Old Ben case, the Commission held that citing an operator for contractor violations solely as a mere administrative expedient would be an abuse. The inspector was specifically asked on cross-examination if he had cited the operator for the contractor's violation as an administrative convenience. The inspector denied that he had cited the operator for mere convenience and stated that he had cited the operator in this instance because that was MSHA's policy (Tr. 42-43). Subsequently, the inspector stated that he was aware that regulations pertaining to citing independent contractors had been proposed and that he was aware that MSHA's policy of citing the operator would probably have to be changed after those regulations have been finalized (Finding No. 11, supra). In such circumstances, I find that the inspector's citing of the operator for Waggle's violation was permissible in this case and that MSHA's Petition for Assessment of Civil Penalty filed in this proceeding should be upheld as a proper way to proceed under the 1977 Act at the time Citation No. 771428 was issued.

The Issue of Whether MSHA Proved that a Violation Occurred

The operator's brief (pp. 3-6) contends that the inspector's testimony was not sufficiently probative to establish that a violation of section 77.1710(a) actually occurred. The operator bases its contention that no violation was proven on two primary arguments. First, the operator claims that the inspector was unable to give sufficient details about the actions of Mr. Hepp to establish that Mr. Hepp was assisting another welder in cutting pieces of metal, as was alleged in Citation No. 771428.

It is true that the inspector did not know precisely what Mr. Hepp was doing. The inspector said that Mr. Hepp (1) could have been merely observing the other welder cut the metal, (2) could have been picking up fallen pieces with a pair of tongs, or (3) could have been marking metal. The inspector candidly conceded that although Mr. Hepp might have been doing any of the aforementioned acts, he could not recall the exact nature of Mr. Hepp's assistance. The inspector said that all he was really claiming was that Mr. Hepp was so close to the cutting torch that he should have been wearing goggles (Tr. 45).

Mr. Hepp corroborated the inspector's statement by testifying that both he and Mr. Horton had been told to cut pieces of metal from a large section of plate. Mr. Hepp stated that he had assisted Mr. Horton in marking the pieces before they were cut. Mr. Hepp further said that although both he and Mr. Horton normally would cut and weld each day, he did not recall that he had personally done any cutting on January 9, 1979, prior to the time that the citation was issued (Tr. 80; 83).

Mr. Horton also corroborated the inspector's testimony by stating that Mr. Hepp was helping him mark the pieces of metal for cutting (Tr. 68). Therefore, I find that the preponderance of the evidence supports the inspector's statement in Citation No. 771428 to the effect that Mr. Hepp was "* * * assisting another welder in cutting out pieces of metal" (Finding Nos. 6 and 7, supra).

The second argument made in the operator's brief (p. 4) is that the inspector could not have determined that Mr. Hepp's eyes were only 2-1/2 feet from the torch while the inspector was 220 feet away, particularly when consideration is given to the fact that two buildings were situated some place between the inspector and the site where the cutting was being done.

A distance of 220 feet is less than the length of a football field. Yet it is easy for a spectator with normal vision at a football game to tell when a player at the most remote part of the field is lying on the ground or running or catching a pass. I find that the inspector made a credible statement when he said he could determine from a distance of about 220 feet that Mr. Hepp was kneeling beside the man who was using the cutting torch. Moreover, it should be recalled that the inspector stated that he first observed the workmen when he was about 220 feet from them. He then said that while he was walking toward the men, he made his determination that Mr. Hepp's eyes were about 2-1/2 feet from the cutting torch. It is unreasonable for the operator to argue that the inspector should be able to specify the exact distance he was from Mr. Hepp when he made his determination that Mr. Hepp's eyes were 2-1/2 feet from the cutting torch. The inspector said that Messrs. Hepp and Horton did not realize that he was approaching them until he was about 10 feet from them. It is certain that the inspector would have been able to determine at some point before he was within 10 feet of the men that Mr. Hepp's eyes were within 2-1/2 feet of the cutting torch. The inspector's last statement on the subject was that he did not think that he made his determination that Mr. Hepp's eyes were within 2-1/2 feet of the torch at a distance of 220 feet, but he is certain that he was able to make that determination by the time he reached the 10-foot distance when the men stopped cutting and turned to face the inspector (Tr. 87-88).

The most that the operator's witnesses said about the inspector's ability to determine the 2-1/2-foot distance was that it would have been hard for the inspector to determine at a distance of approximately 220 feet that Mr. Hepp's eyes were within 2-1/2 feet of the cutting torch (Finding No. 8, supra). None of the operator's witnesses were asked to give an opinion as to whether the inspector could have made that determination when he was somewhere between 100 and 10 feet from the men. I find that the preponderance of the evidence supports a finding that the inspector made a credible statement when he said that he was able to determine that Mr. Hepp's eyes were within 2-1/2 feet of the cutting torch.

The operator's brief (pp. 5-6) also contends that its witnesses' testimony to the effect that Mr. Hepp always stood behind Mr. Horton when Mr. Horton was cutting is more credible than the inspector's testimony to the effect that Mr. Hepp was kneeling down and was within 2-1/2 feet of the torch while Mr. Horton was cutting. The operator's brief cites Mr. Horton's statement that Mr. Hepp stood to the rear of Mr. Horton while Mr. Horton was cutting. Mr. Horton also claimed that while he was cutting, Mr. Hepp was not engaged in marking the metal (Tr. 68; 71; 74). The operator's brief also cites Mr. Hepp's testimony to the effect that he always stood up and turned around when Mr. Horton started cutting with the torch. Mr. Hepp also testified that he was about 5 feet 7 inches tall and that his face was about 6 or 7 feet from the cutting torch when Mr. Horton was cutting (Tr. 76; 84).

The operator's brief (p. 6) additionally argues that the inspector's inability to be certain as to details is fatal to MSHA's case. In order for the inspector's lack of certainty as to what Mr. Hepp was doing to be fatal to MSHA's case in this proceeding, the lack of certainty would have to bear directly on the nature of the violation charged. The inspector was certain as to the vital point necessary for his testimony to support his allegation that a violation of section 77.1710(a) occurred, namely, the inspector said that he was certain that Mr. Hepp's eyes were close enough to the cutting torch to make it essential for him to wear goggles in order to protect his eyes from possible injury (Tr. 45). Moreover, as I have previously indicated above, the inspector's inability to know what Mr. Hepp had been doing before he came within the inspector's scrutiny did not prevent the inspector from correctly concluding that Mr. Hepp had unnecessarily exposed himself to the hazard of a possible eye injury by kneeling down close to the cutting torch.

As to the operator's credibility arguments, I find, for at least two reasons, that the inspector's testimony was more credible than that of Mr. Hepp. First, it should be recalled that Mr. Hepp testified that when Mr. Horton began cutting with the torch, he stood up and turned around (Tr. 76). At no time did Mr. Hepp ever deny that the inspector was within 10 feet of him before he realized that the inspector was in his vicinity. If Mr. Hepp had actually stood up and turned around while Mr. Horton was cutting with the torch, Mr. Hepp would have been in a position to see the inspector approaching and would have been able to assert when the inspector cited him for failing to wear goggles that he was not even looking in the direction of the cutting torch, must less close enough to be injured by flying bits of molten metal.

The second reason for downgrading the credibility of Mr. Hepp's testimony is that Mr. Hepp testified that it was his practice to cut and weld every day that he was at the construction site. He stated that when he did cut or weld that he always wore goggles or an eye-shield. He further said that he kept his goggles in his toolbox. Despite Mr. Hepp's assertion that he kept his goggles in his toolbox, it was necessary for Mr. Hepp to go to the welding shanty in order to obtain goggles when he was cited by the inspector for failure to wear goggles (Tr. 80-81). If Mr. Hepp had been accustomed to wearing goggles when he was cutting, it is very unlikely that he would have had to go all the way to the welding shanty to procure goggles when his supervisor asked him to get them.

Finally, the operator's brief claims that MSHA could have produced other witnesses to substantiate the inspector's claim as to the 2-1/2-foot distance and to fill in other details lacking in the inspector's testimony. The choice of witnesses was a defect which was more apparent in the operator's presentation than it was in MSHA's. The inspector stated that Waggle's safety representative, Mr. Sam Higgerson, was with him at the time he observed Mr. Hepp violating section 77.1710(a) (Finding No. 4, supra). Yet the operator tried to cast doubt on the inspector's ability to see the cutting operation from a distance of 220 feet by bringing in a witness who was not even with the inspector at the time the violation was observed. Clearly, the only person who could have placed a real cloud of doubt over the inspector's testimony would have been another person who was standing at the same place the inspector was standing when the inspector first observed the cutting operation. The operator's failure to present Mr. Higgerson as a witness is a strong indication that Mr. Higgerson was also able to see Messrs. Horton and Hepp at a distance of 220 feet. Moreover, Mr. Higgerson would have been able to draw a diagram showing the exact location of the two buildings which were allegedly close to the west end of the dragline and Mr. Higgerson would have been able to state with certainty whether the inspector was standing in a place where the buildings would have blocked his view of the boom area where the cutting operation was in progress.

Based on my credibility determinations and the foregoing discussion, I find that the preponderance of the evidence shows that a violation of section 77.1710(a) occurred. It is now necessary to consider the six criteria set forth in section 110(i) of the Act to determine what civil penalty is appropriate.

Size of the Operator's Business

On the basis of the facts set forth in Finding No. 1, supra, I find that Southwestern Illinois Coal Corporation is a large operator and that any penalty assessed in this proceeding should be in an upper range of magnitude insofar as it is based on the criterion of the size of the operator's business.

Effect of Penalties on Operator's Ability To Continue in Business

Counsel for the operator did not present any evidence at the hearing with respect to the operator's financial condition. In Buffalo Mining Co., 2 IBMA 226 (1973), and in Associated Drilling, Inc., 3 IBMA 164 (1974), the former Board of Mine Operations Appeals held that when a respondent fails to present any evidence concerning its financial condition, a judge may presume that payment of penalties would not cause respondent to discontinue in business. In the absence of any specific evidence to the contrary, I find that payment of penalties will not cause the operator to discontinue in business.

History of Previous Violations

Counsel for the operator and MSHA introduced at the hearing as Exhibit No. 1 some data which the Assessment Office used in this proceeding to arrive at a determination that the operator's history of previous violations would result in assignment of 8 points for the purpose of determining penalties in accordance with the procedures set forth in 30 CFR 100.3. The Commission held in Secretary of Labor v. Shamrock Coal Co., 79-6-5, 1 FMSHRC 469, that a judge is not bound by the procedures used by the Assessment Office in determining penalties and that de novo assessments are within the authority of the Commission and its judges. When I am considering motions for approval of settlements, there is reason for me to review the Assessment Office's findings as to the number of points which have been assigned under the six criteria. In a contested case, however, I would prefer that counsel for MSHA introduce a listing of respondent's actual previous violations, if any, so that I can make findings regarding the criterion of history of previous violations without having to examine the findings of the Assessment Office.

Normally, I increase penalties when there is evidence before me to show that a given operator has previously violated the same section of the regulations which is charged in MSHA's Petition for Assessment of Civil Penalty in the case under consideration. In this case, the parties stipulated that the operator has not previously violated section 77.1710(a). Therefore, I find that respondent has no history of previous violations which has to be considered when a penalty is assessed for the violation of section 77.1710(a) which is before me in this proceeding.

Good Faith Effort To Achieve Rapid Compliance

Citation No. 771428 gave Mr. Hepp a period of 5 minutes within which to procure goggles. Mr. Hepp was able to obtain goggles within the time given and the inspector terminated the citation 5 minutes after it had been issued. It was the inspector's opinion that a good faith effort to achieve rapid compliance had been shown (Tr. 19). Therefore, I find that a good faith effort to achieve rapid compliance was made and the operator will be given full credit for that mitigating factor in the assessment of a penalty.

Negligence

Counsel for MSHA introduced as Exhibit No. 3 a form on which the inspector had indicated his views with respect to the criteria of negligence and gravity. On Exhibit No. 3, the inspector checked a box which states that "[t]he condition or practice cited could not have been known or predicted; or occurred due to circumstances beyond the operator's control." At the hearing, the inspector testified that the operator had tried to the best of its ability, short of discharging employees, to get the workers to wear protective eyewear (Tr. 18).

I find on the basis of the evidence in this proceeding that the violation of section 77.1710(a) was accompanied by a low degree of negligence.

Gravity

On the basis of Finding No. 10, supra, I find that the violation was moderately serious. The piece of metal which was being cut with the torch was supported by two crib blocks so that the molten metal would drop to the ground (Tr. 73). In such circumstances, there was not a very strong likelihood that Mr. Hepp would have received a severe injury because of his failure to wear goggles.

Assessment of Penalty

The inspector made the following recommendation with respect to the assessment of a penalty (Exh. 3, p. 2):

> On this particular site, management has repeatedly attempted to enforce safe working habits. Some employees, however, attempt to circumvent the using of protective equipment. Although management is ultimately responsible for violations, I feel that in this case leniency should be exercised when assessing the penalty. It is impossible for management to accompany and supervise each employee every minute of the day.

Exhibit 1 indicates that the Assessment Office proposed a penalty of $84.00 for the violation of section 77.1710(a) here involved. MSHA's brief (p. 11) requests that a penalty of not less than $84.00 be assessed. As indicated above, I am not bound by the Assessment Office's recommended penalties, but my findings must be based on the evidence presented by the parties. The inspector testified that the operator was not negligent and the inspector made a special plea for leniency in the assessment of the penalty. The facts show that the violation was only moderately serious. In such circumstances, I find that the penalty of $84.00 proposed by the Assessment Office is fair and reasonable in light of the evidence presented by the parties in this proceeding.

Findings and Conclusions

(1) Under the facts in this proceeding and current Commission precedents, MSHA's Petition for Assessment of Civil Penalty should be sustained in citing respondent for the independent contractor's violation of section 77.1710(a).

(2) Southwestern Illinois Coal Corporation should be assessed a penalty of $84.00 for the violation of section 77.1710(a) alleged in Citation No. 771428 dated January 9, 1979.

(3) As the operator of the Streamline Mine and controller of the erection site involved in this proceeding, Southwestern Illinois Coal Corporation is subject to the Act and to all regulations promulgated thereunder.

WHEREFORE, it is ordered:

Within 30 days from the date of this decision, Southwestern Illinois Coal Corporation shall pay a penalty of $84.00 for the violation of section 77.1710(a) alleged in Citation No. 771428 dated January 9, 1979.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 14 1980

ALABAMA BY-PRODUCTS CORPORATION, Petitioner	:	Contest of Citation
v.	:	Docket No. SE 80-41-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mary Lee No. 2 Mine

DECISION AND ORDER GRANTING MOTION FOR SUMMARY DECISION

On December 12, 1979, Petitioner was issued Citation No. 748714 which alleged a violation of section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(f) (hereinafter the Act). That section provides that miners may accompany inspectors on mine inspections and suffer no loss of pay. 1/ On December 19, 1979, Petitioner filed a notice of contest of that citation which contended that it had not violated section 103(f) of the Act. Petitioner here moves for summary decision of its contest of citation.

1/ "Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act."

Summary decision shall be granted "only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) that there is no issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law." 29 CFR 2700.64(b).

The facts in this case as outlined in Petitioner's affidavits are not disputed by Respondent. On November 29, 1979, 12 MSHA inspectors conducted a "blitz" inspection of Petitioner's mine. The inspection was not a "regular" inspection of the mine under section 103(a) of the Act. Miners were permitted to accompany the inspectors but were not compensated for the time they spent accompanying them.

The issue here is whether those undisputed facts constitute a violation of Section 103(f) of the Act. In Secretary of Labor v. Helen Mining Company, Docket No. Pitt 79-11-P (November 21, 1979) (appeal pending No. 79-2537 (D.C. Cir., Dec. 21, 1979)), the Federal Mine Safety and Health Review Commission (hereinafter Commission) held that section 103(f) requires payment to miner representives accompanying inspectors only during "regular" inspections of mines.

The case does not involve a "regular" inspection of a mine. Pursuant to the Commission's decision in Helen Mining, supra, the miners therefore are not entitled to be compensated for the time they spent accompanying the inspectors. Petitioner did not violate section 103(f) of the Act and is therefore entitled to summary decision as a matter of law.

Accordingly, it is ORDERED that the motion for summary decision is GRANTED, and the citation is VACATED.

James A. Laurenson

James A. Laurenson
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

February 15, 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WILK 79-149-P
Petitioner : A.C. No. 36-02011-03001
v. :
: Stoudt's Ferry Preparation
STOUDT'S FERRY PREPARATION COMPANY, : Plant
Respondent :

ORDER APPROVING SETTLEMENT AND DIRECTING PAYMENT

On February 11, 1980, Petitioner filed a motion to approve a settlement in the above-captioned proceeding. The Petitioner states that the amount of the original assessment is $470 and the amount of the settlement is $200.

As grounds for its motion, the Petitioner states that the citation in question was issued for the operator's denial of entry to an authorized representative for the purpose of conducting an inspection. The third circuit, in Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589 (3rd Ai. 1979), determined that the company was covered by the Mine Safety and Health Act and that MSHA has jurisdiction over its operations. The Supreme Court denied certiorari. The company was not exercising bad faith in denying entry. Petitioner further states that lack of negligence justifies a reduction in penalty.

Therefore, it is ORDERED that the motion to approve settlement is GRANTED and Respondent is ORDERED to pay $200 within 30 days of the date of this order.

James A. Broderick
James A. Broderick
Chief Administrative Law Judge

Distribution:

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Barbara Krause Kaufmann, Attorney, Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104

Dktl

Assessment Office, MSHA, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 19 1980

CLIMAX MOLYBDENUM COMPANY, Applicant	:	Application for Review
v.	:	Docket No. WEST 79-325-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 333105; 7/27/79 Climax Open Pit

DECISION

Appearances: W. Michael Hackett, Esq., Richard W. Manning, Esq., Climax Molybdenum Company, Golden, Colorado;
Robert A. Cohen, Esq., Michael Bolden, Esq., Office of the Solicitor, Arlington, Virginia.

Before: Judge Charles C. Moore, Jr.

At 4:30 p.m. on July 18, 1979, Terry Carter, a 28-year old miner, lost his life in his M-120 Lectra-Haul haulage truck when it turned over while coming down the road that leads from Ceresco Ridge to the crusher. Joint Exhibit No. 1 [1] is a drawing of the area of the accident and has the victim's route from shoveling on Ceresco Ridge Road to the accident site marked thereon. No one disputes the fact that the victim lost control of the haulage truck after passing the lower 835 curve and that he turned over about 2,000 feet farther down the hill in the vicinity of the K stockpile. As to the cause of the accident, there is complete disagreement.

MSHA itself has two positions. The enforcement branch, that is the inspectors and the Solicitor's Office, contend that the accident was caused because both the dynamic brakes and the air hydraulic brakes failed and that they failed because of poor maintenance practices and that management knew or should have known of the condition of the brakes. An unwarrantable failure order was issued by the inspectors. MSHA's technical support branch, however, conducted an extensive examination of the haulage truck after the accident and concluded that both the dynamic brakes and the air hydraulic brakes were functioning. The State of Colorado, on the other hand, says the accident was caused by the poor training program conducted by Climax and Climax contends that the accident was caused by the driver's failure to operate the haulage rig and the two sets of braking devices properly.

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[1] The exhibit is attached to this decision.

The two sets of brakes on the Lectra-Haul M-120 haulage rig are a standard air-over hydraulic mechanical braking system and an electric dynamic retarding system. The air-over hydraulic system is sometimes referred to in the testimony as the "air brakes" and sometimes as the "service brakes," but they are not intended to act as the normal slowing system. The instructions given to the drivers and contained in the operator's manual are that unless there is an emergency, these brakes are not to be used when the vehicle is moving in excess of 3 miles per hour. They can be engaged by a foot pedal, by a knob on the instrument panel or by a lever on the floor. If they are not engaged by the foot pedal, the system is referred to as "dump brakes" (I gather from the testimony this is similar to parking brakes) or emergency brakes, but regardless of how actuated, the system involves air at a pressure in excess of 60 pounds per square inch actuating the hydraulic system which applies hydraulic pressure to cylinders which force brake pcuks (sometimes referred to in the testimony as "pads" or "brake linings") against the disks which are affixed to the wheels. The disks do not float laterally as in some braking systems where the hydraulic pressure is applied from only one side, but are firmly fixed and hydraulic pressure is applied from both sides of each disk. There are four disks in the rear section of a Lectra-Haul truck, two disks for each set of dual rear wheels. The devices containing the hydraulic cylinders and brake linings are called "calipers" and there are four cylinders and two brake linings to each caliper. One caliper is attached to each of the four disks in the rear section of the truck and to each of the two disks in the front section of the truck. These brakes would be damaged if used in excess of 3 miles per hour, but there is no dispute that they are capable of stopping the Lectra-Haul M-120 even if the dynamic braking system fails unless the rig is being operated at a speed in excess of 30 miles per hour (see testimony of Linda Knight).

The dynamic brakes are designed to slow the rig down to 3 miles an hour, but will not actually stop it. The driving mechanism in this type of rig is similar to a diesel electric locomotive. A diesel engine runs a generator and the generator provides the power to operate the truck. There is an electric motor for each rear dual wheel and when the dynamic retarding pedal (a pedal similar to and located next to the air brake pedal) is depressed, the electric motors in the wheels create some kind of magnetic retardation that will slow the truck in ordinary circumstances to 3 miles per hour. Several witnesses explained that when the dynamic retardation pedal is pressed the electric motors turn into generators and generate electricity which is dispersed into grids, thus slowing the truck. I have no idea what that means or why dispersing electricity created by the generators would slow the truck, but I suspect that the electricity is used to actuate an electromagnet which acts against the movement of the rig. But in any event, there was no dispute about the fact that, if working properly, the dynamic system would slow the haulage rig to 3 miles per hour.

There were 30 of these Lectra-Haul M-120 rigs at Applicant's mine. The No. 16 rig was the one in which Terry Carter lost his life on July 18, 1979, and there was considerable testimony that this was a troublesome piece of equipment. Truck driver Linda Knight testified that she had driven rig No. 16 on several occasions and that the last time, on July 8, it had weak dynamic brakes. She testified that she was bringing it down unloaded from the Cirque Dump (see Joint Exhibit No. 1) on a route very similar to the one that Terry Carter had taken on July 18, and that she had had to use full dynamics to control the speed of the rig even though she had no load in the hopper. There was some documentary evidence indicating she had not driven the truck on July 8 but she was such an impressive witness that I believe her testimony rather than the entries in the documents. Mr. Miller is a truck driver trainer, that is, a truck driver who also trains new drivers. He testified that he had driven rig No. 16 on occasion and that he found the service brakes (air hydraulics) spongy and the dynamics bad. Carlos Archuleta testified that he was assigned regularly to rig No. 16 and that he had lost his dynamics approximately a month prior to the accident. He used his air hydraulic brakes to control the truck at that time. He stated that he did not like rig No. 16 because of the brakes and that he used several excuses to refuse it during the month before the accident. On the day of the accident when he heard that Terry Carter had been assigned to rig No. 16, he made a hand motion to Mr. Carter to refuse to drive the rig. Mr. Carter did not do so, however. Mr. William Harbuck testified that he had driven rig No. 16 on July 13 and that he noticed leaky brake hydraulics, poor suspension and weak dynamics. He had had to use his service brakes to control his speed and did not want to drive rig No. 16 anymore. During the accident investigation, however, the one conducted by MSHA shortly after the accident, he stated that the dynamics on rig No. 16 were as good as those of any of the other rigs. Truck driver Dries, on the other hand, who was the driver of rig No. 16 immediately preceding the shift during which the fatality occurred, stated that he was satisfied with rig No. 16 and that he had made eight trips using the same route as the victim without trouble. He did state, however, that because of a previous incident where a wheel fell off of a rig, he was extremely conscious of speed and never exceeded what he considered to be a safe speed with rig No. 16.

The haulage rigs at this mine are equipped with two-way radios so they can inform the base coordinator of any problems and also so they can receive instructions from the base coordinator as to what functions they are to perform and where they are to perform them. Shortly before the accident, evidently within 2,000 feet of the accident scene itself, Mr. Carter transmitted a message to the base coordinator that he was having trouble with his dynamics. According to the base coordinator, Lee Heilman, he stated that he was losing dynamics. She asked for his location and he replied "upper K." She asked him if he could make it to the F stockpile and said that he replied in the affirmative. According to Linda Knight, he said either "I'm losing dynamics" or "I have lost dynamics," but she could not state exactly which he had said. Mr. Miller heard Mr. Carter say "I lost my dynamics." He heard someone else say "Hit your service brake" and then heard the statement "I tried." Mr. Archuleta heard Mr. Carter say "Hello, base, I have lost my dynamics." Then he heard something like "I can't " or "It won't work now." He did not hear the intervening conversation that would indicate what Mr. Carter was referring to and no one has been able to identify who stated

"Hit your service brake." No witness indicated there was panic in Mr. Carter's voice when he reported his service brake problem and while there is obviously a difference between losing dynamics and lost dynamics, there is no way to determine whether Mr. Carter had actually lost his complete dynamic braking system or whether it was not performing to his satisfaction. He was was obviously having trouble, but there was no indication that he was frightened. Like many radio communications, all statements were not heard in the same way by all of the people listening. A common feature of radio communication is having a transmission cut out by another transmission for one listener while another listener hears the original transmission intact. Someone heard Mr. Carter ask if he could use the service brakes, meaning the air hydraulic system. In a panic situation, I doubt that he would ask permission.

Mr. Carter's location at the time he announced that he was losing or had lost his dynamics, can be fixed with reasonable accuracy. The route he was traveling from the No. 3 shovel (all of the areas which I am now discussing are depicted upon Joint Exhibit No. 1) to the accident scene involved first negotiating a sharp curve known as the 835 upper curve. According to Linda Knight, it was clear that his dynamics had been working when he negotiated this curve or he could not possibly have made it. At the lower 835 curve, there is a road where, if the victim had been having trouble with his brakes, he could have turned up hill and thus stopped. It is therefore fairly clear that he had passed the lower 835 curve when he complained about his dynamics. He told Coordinator Heilman that he was in upper K, but all this means is that he was above the K stockpile where the accident occurred. But the transmission must have been made shortly after the victim went over the level spot at 835 lower curve and started down hill again on a grade that is between 8 and 9 percent. The location can also be fixed by the fact that Carlos Archuleta was driving the rig immediately preceding the one driven by Mr. Carter and was in the vicinity of the K stockpile when he heard the first transmission. He looked in his mirror and could not see rig No. 16, but when he turned around and looked directly back over his shoulder, he could see it and then when he turned back to make sure that he was still in the proper part of the road, he could pick up rig No. 16 in his mirror and he observed it for a few seconds noting that it was going at an excessive rate of speed. There are lights on the front of these rigs which indicate whether the dynamic or air hydraulic braking systems are being actuated. He did not see either of these lights on. It was later determined that the lights are actuated by the pedals themselves and do not indicate whether the braking system is actually working, but merely whether the pedals are being depressed. It was also later agreed that sometime before the accident Mr. Carter probably ceased his efforts to stop the truck and was preparing to abandon it. The fact that the door was open at the time of the rollover lends credence to this proposition. It is also supported by the fact that pictures taken at the scene and the testimony as to the description of the tire tracks indicate that the air hydraulic brakes were working at one point, but that no braking was evident immediately before the area where the rig struck the berm on the K stockpile. The photographs themselves are not convincing, but they do support the testimony that was given.

Inspector Stoutenger issued the first citation, but shortly after the accident investigation began, he left town. Inspector Marti, who accompanied Inspector Stoutenger during the initial field investigation at the scene of the accident, after studying numerous records provided by the company, amended the citation to charge an unwarrantable failure. 2/

Inspector Marti relied on the radio communication from the victim as evidence of the failure of the dynamic brakes and he relied on his inspection of the left rear dual after the rig was righted as evidence that the air hydraulic brakes were not working. In issuing the modification to allege an unwarrantable failure he relied on the maintenance records that he examined for a total of about 40 hours as indicating that management knew or should have known that the brakes were defective.

There were a number of discrepancies between the two inspectors' testimony and the testimony of the company witnesses and they disagreed on the interpretation of the photographs that were offered in evidence. There was disagreement between the inspectors themselves as to when the photographs were taken and as to whether the inspectors were present when the rig was righted and when it was moved approximately 25 feet. There is disagreement as to how some air may have gotten into the left dual wheel hydraulic system. There is disagreement about whether damage was done to the braking system when Applicant was moving the rig to the shop area, but it is clear that one of the MSHA officials authorized the move.

It is also clear that there was some tampering with the rig after the accident and before the physical investigation supervised by MSHA's technical support staff commenced. The throttle control lever was found to be hooked up improperly, in such a fashion that neither the dynamic braking system nor the electrical tramming system would work. It was therefore obvious, since the tramming system had worked during the climb to the No. 3 shovel and since the dynamic braking system must have been working when the rig came around the upper 835 curve, that someone for some reason unhooked this particular device and then reattached it in the wrong place. But no motive was speculated upon by either side and the wheels and other components were padlocked to prevent tampering. In the absence of any indication as to the motive for tampering or how such tampering could have affected the final results of the inspection, I see no alternative but to disregard it. If the MSHA investigators or attorneys know something about this tampering that they did not wish to present in evidence before me, they may wish to present it in a criminal case, but since I have heard no evidence as to who did the tampering or why it was done, it will not affect this decision.

2/ A key element of an unwarrantable failure citation is the absence of an imminent danger. If a violation causes the death of a miner, how can it be said that the violation did not create an imminent danger? The parties have not addressed this issue, however, so I will not pursue it further.

There are many other troublesome factors involved in this case. For example, batteries are important components of the dynamic braking system. If they are not fully charged, the system will be impaired. When the truck overturned, the battery electrolyte spilled and had to be replaced before the technical support tear-down and investigation could be completed. Also, since the rig had lost its air pressure as a result of the destruction of air hoses in the accident, the service or air hydraulic brakes were mechanically locked at the time the truck was righted.

In order to remove it to the shop, it was necessary to back off on some nuts or bolts to release the spring pressure on the brakes because when all air is lost or when it goes below 60 pounds per square inch, the brakes are spring loaded to set automatically. Therefore, when the technical support inspectors were preparing for their inspection, they had to reset the spring loading bolts or nuts and thus were not inspecting the braking systems in the exact condition in which they were at the time of the accident. The technical support recommendation was that more care should be taken in the future to avoid destroying evidence while moving a piece of equipment.

The technical support group nevertheless concluded that the dynamics and air hydraulic systems were working properly. When Mr. McGuire of the technical support group was testifying, there was an attempt to pin him down as to whether he meant the brakes were operable on the day of the accident or the day of the inspection and while he had apparently previously testified during the initial investigation that they were operable on July 18, he qualified this to say that they were operable on the date that he conducted the inspection. I think that is all that he could properly testify to.

Inspector Marti relied on an entry in a document in Government Exhibit No. 9 to show that a dynamic complaint about rig No. 16 on an earlier date had been ignored. The entry on the document said "Could not fix, maybe next time." When Applicant's first class electrician, Mr. Valverde testified, however, and identified Applicant's Exhibit No. 12, it became absolutely clear that before the rig left the shop, Mr. Valverde fixed the dynamics. He did so by replacing one or more of the so-called "cards" which are in fact devices containing a printed circuit on one side and various electrical components such as condensors and transistors on the other side. These are plugged in at various places in the electrical system of the M-120 rig and if certain ones heat up and fail, it affects the dynamics. Mr. Valverde replaced the particular one that concerned stabilizing the current and it appeared to work. He then tested the machine and released it. There was evidence in the case that this was all explained to Inspector Marti, but that he either ignored it or did not understand it. I noticed during the trial that Inspector Marti did have some trouble understanding questions put to him but I attribute this to the stress of being on the witness stand. It is to this same stress that I attribute his erroneous statement that no photographs were taken by MSHA after July 19 when it was perfectly obvious that at least one of the photographs was taken after the truck had been righted on July 20. His explanation was that he was talking about photographs he took and I believe him, but it was nevertheless his earlier testimony that none of the MSHA officials had taken pictures of the rig at the accident site after July 19 (Tr. 336). Inspector Stoutenger at first stated that the pictures were taken on the 19th and that he was present when the rig was uprighted. He later agreed that he was not present when the rig was uprighted, but he was of the opinion that he and Inspector Marti had examined the left rear dual brakes on July 19 sometime after 1:30. Inspector Marti said that the examination had been on the next day and he is apparently correct since the rig was not righted until July 20. All these factors I attribute to the stress of being a witness, but in a case where both parties have conducted extensive discovery and have reviewed their notes in a serious manner, I am surprised that such discrepancies occurred.

There was testimony that rig No. 16's suspension system was so bad that it "threw you all over the cab" when you were trying to drive it. There were complaints about its steering. Either the suspension system or the steering system may have caused Mr. Carter to lose control of rig No. 16, but that is not the charge that the Government has brought in this case. It has charged that he lost control of the rig because neither the dynamic braking system nor the air hydraulic braking system was working and that Climax knew or should have known that these systems were defective. I will not speculate as to whether the State of Colorado or Climax have the correct answer to the cause of this accident. There are certain facts, however, that convince me that the cause was not the cause alleged by MSHA.

First, truck driver Dries had no trouble with either the dynamic system or the air hydraulic system on the previous shift. Second, as testified by Linda Knight, the dynamic system must have been working when rig No. 16 negotiated the upper 835 curve on the afternoon of the accident. Third, skid marks on a portion of the distance between the lower 835 curve and the K stockpile supported by the testimony of two witnesses that upon examining the brakes during the technical support investigation, they found heat checks and glazed cracks indicating extremely heavy use of the mechanical braking system, and their further testimony that the components appeared to be almost new (brake linings thicker than required, disks thicker than required and calipers properly positioned) indicated to me that the air brakes were working. Fourth, two witnessess testimony that when the vehicle was righted and pulled off the berm on July 20, the rear brakes were set and locked and caused the tires to skid when the vehicle was moved. In addition, the vehicle could not be moved to the shop without loosening the bolts or nuts which are attached to the springloaded braking system. There was some evidence that Inspector Stoutenger saw company personnel attempt to move the rig back up the hill, but that does not overcome the fact that the wheels skidded when the attempt was made to move the vehicle forward; the direction it was traveling at the time of the accident. I cannot ignore these facts despite the sympathy I have for miners who may be driving rigs that they consider unsafe. If the M-120 Lectra-Haul truck is inherently unsafe for this type of mining operation MSHA should act to prohibit its use. In this case, however, I cannot find that Applicant's maintenance procedures were insufficient. I am also somewhat surprised that a complete autopsy was not performed. Although I understand the examining physicians declared neither drugs nor alcohol were involved in the accident, there was no investigation as to whether a heart attack or other disabling condition could have developed during the course of the accident.

The citation is VACATED.

Charles C. Moore, J

Charles C. Moore, Jr.
Administrative Law Judge

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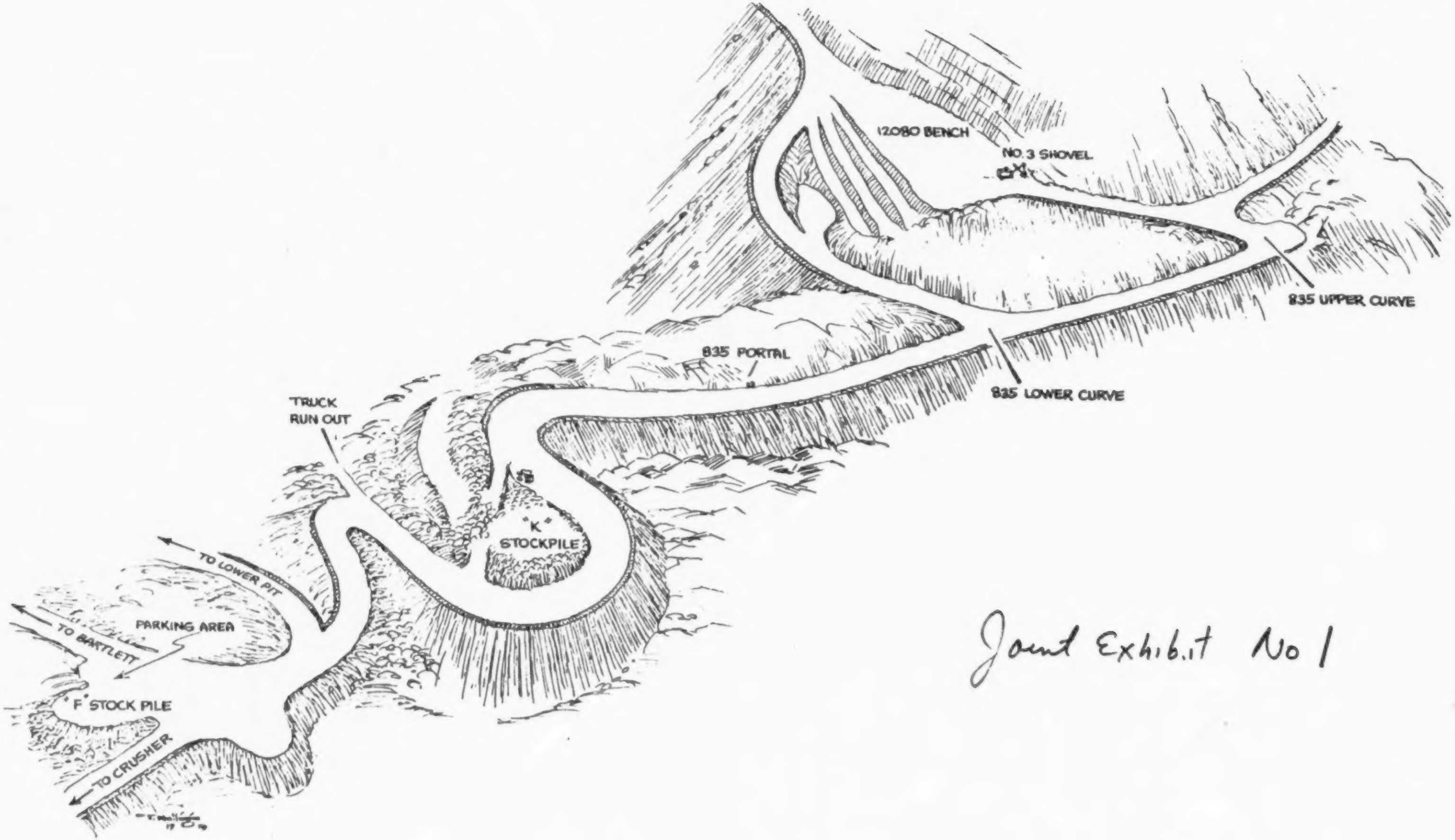
12080 BENCH
NO. 3 SHOVEL
835 UPPER CURVE
835 PORTAL
835 LOWER CURVE
TRUCK RUN OUT
"K" STOCKPILE
TO LOWER PIT
PARKING AREA
TO BARTLETT
"F" STOCK PILE
TO CRUSHER

Joint Exhibit No 1

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 19 1980

CONSOLIDATION COAL COMPANY, : Application for Review
Applicant :
v. : Docket No. WEVA 79-351-R
:
SECRETARY OF LABOR, : Ireland Mine
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Respondent :

DECISION

Appearances: Michel Nardi, Esq. Consolidation Coal Company, Pittsburgh, Pennsylvania, for Applicant.
Barbara K. Kaufmann, Esq., Office of Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This a proceeding filed by Consolidation Coal Co. (hereinafter "Consol") under section 107 (e) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 817(e), to vacate an order of withdrawal due to imminent danger issued by a federal mine inspector employed by the Mine Safety and Health Administration (hereinafter "MSHA") pursuant to section 107 (a) of the Act. The parties filed prehearing statements and the case was heard in Pittsburgh, Pennsylvania, on January 8, 1980.

This matter involves a "fall" or "sag" of a concrete floor supporting an elevated conveyor belt in the preparation plant at the Ireland Mine. Consol concedes that there was a structural failure but contends that it had voluntarily corrected or abated the condition prior to the issuance of the order of withdrawal. Hence, Consol asserts that no imminent danger existed at the time the inspector issued the order in question.

ISSUES

The general issue is whether the issuance of the order of withdrawal due to imminent danger was proper. The specific issue is whether the voluntary correction or abatement of the condition by the operator prior to the issuance of the withdrawal order precludes a finding of imminent danger.

APPLICABLE LAW

Section 107(a) of the Act, 30 U.S.C. § 817(a), provides as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

Section 3(j) of the Act, 30 U.S.C. § 802(j), states: "'imminent danger' means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

STIPULATIONS

The parties stipulated the following:

1. Ireland Mine is owned and operated by Applicant, Consolidation Coal Company.

2. Consolidation Coal Company and the Ireland Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The Administrative Law Judge has jurisdiction over this proceeding pursuant to Section 105 and Section 107 of the 1977 Act.

4. The inspector who issued the subject Order was a duly authorized representative of the Secretary of Labor.

5. A true and correct copy of the Subject Order was properly served upon the operator in accordance with Section 107(d) of the 1977 Act.

6. Copies of the Subject Order and Termination are authentic and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

7. The alleged violation was abated in a timely fashion and the operator demonstrated good faith in attaining abatement.

8. Consolidation Coal Company agrees that a violation of the cited standard, 30 C.F.R. § 77.200 did exist on July 31, 1979.

SUMMARY OF THE EVIDENCE

The undisputed evidence shows that Consol operated a refuse conveyor belt through a gallery in its coal preparation plant at the Ireland Mine. The gallery in question was 23 years old and ran a distance of sixty feet from one wing of the plant to another on a grade which caused the gallery to be elevated between 10 feet and 27 feet above ground. The conveyor belt carried refuse and the structure was hosed down twice a day. The conveyor belt was 30 inches wide and was contained in an 8-1/2-foot wide gallery structure. All four sides of that structure were enclosed. The floor of the structure consisted of concrete reinforced with corrugated steel and steel wire mesh. On each side of the floor was a series of channels joined by plates which gave the appearance of an I beam. The channels were connected to steel angle bars which formed the sides of the gallery. The angle bars were covered with Transite which enclosed the structure.

Sometime between 1:55 a.m. and 2:10 a.m. on July 31, 1979, a "fall" or "sag" occurred in the gallery structure. All witnesses agreed that approximately 15 feet of the 60-foot structure "fell" or "sagged" approximately 1 foot. Shortly thereafter, Leon Heck, general foreman of the preparation plant was called to the site. He testified that he arrived at the plant at about 2:30 a.m. The conveyor belt was running but there was no material on the belt at the time of the occurrence. As to the structural failure itself, Mr. Heck observed that the channels forming one joint of the bottom

I beam failed. Six angle bars on each side of the structure separated from the floor during the occurrence. The area of the sag was identified as beginning approximately 10 feet from one wing of the plant and extending for a distance of approximately 15 feet. The sag was readily visible from the ground outside the structure. The I beam, constructed out of channels and cover plates, appeared to be bent.

Mr. Heck testified that after he inspected the structure he thought that the condition was serious and he turned off the conveyor belt and called the general superintendent of the mine. Thereafter, a conference occurred between Mr. Heck, the general superintendent, the master mechanic, and the shop foreman. It was agreed that a crib should be constructed under the sagged area. The conferees felt that the remainder of the structure had stabilized. Although Mr. Heck conceded that other angle bars were rusted or deteriorated at the floor level, he thought that they were sufficiently strong to support the remainder of the structure.

A work crew then constructed a crib out of 6-foot railroad ties. At the top of the crib, 10 foot railroad ties were used. A hydraulic jack was used to raise the structure 6-inches and lower it onto the crib. Although the inspector recalled seeing only one crib under the structure, Mr. Heck testified that a second smaller crib was constructed out of 30 inch railroad ties and situated adjacent to the first crib. Both cribs were constructed in approximately two hours.

After the cribs were constructed, the miners expressed concern to Mr. Heck about the possibility of Transite falling from the sides of the structure and falling debris from a hole in the wall of the structure. The hole in the wall occurred when the structure sagged. Mr. Heck agreed with the miners and ordered that the area under and around the structure be roped and "dangered off." However, he left a walkway in the area under the structure so that miners could enter and leave the plant. The gallery and conveyor belt were not "dangered off." At approximately 7:30 a.m. a Consol vice-president arrived at the site and ordered the employment of a structural engineer and contractor to determine what permanent repairs were necessary. Upon completion of construction of the cribs and "dangering off" the area under the gallery structure, normal operations were resumed.

At approximately 9:30 a.m. on the morning of July 31, 1979, MSHA inspector, Kenneth Williams, arrived at the Ireland Mine to conduct a regular inspection. At that time, two members of the union safety committee approached him, informed him that there was problem in the preparation plant and asked him to inspect it. These men informed him that the structure containing the conveyor belt fell during the prior shift and that although some repairs had been made, they were afraid of another fall. Thereupon, he entered the preparation plant and inspected the interior of the gallery. The conveyor belt was operating. He observed 20 angle irons on each side of the structure which formed the walls. Ten of these supports on the left side were deteriorated and separated from the beam at floor level. The walkway on each side of the conveyor belt was covered with wet debris of up to 1 foot in depth. The bottom support I beam appeared to be badly deteriorated as it was rusty and corroded. He entered the gallery from low side of the structure and he walked up to the high side on the left of the conveyor belt. He testified that he did not cross over to the right of the conveyor belt but that side appeared to be worse than the left side. There is evidence that two angle bars on the left side had been recently welded to the beam. However, 10 other angle bars had deteriorated to the point that they were no longer attached to the beam. He spent approximately 20 minutes inside the gallery and walked back and forth several times. He testified that he did not feel safe inside the gallery but that he is exposed to hazards as part of his job.

Upon completion of his inspection of the interior of the building, inspector Williams went outside to complete his inspection. He observed that the I beam supporting the structure was bent. The structure had sagged to a depth of approximately 1 foot in an area extending for approximately 15 feet of the 60-foot structure. He observed one crib constructed out of railroad ties which was under part of the sagged area but not totally supporting it. The crib did not appear to eliminate the sag. There may have been two cribs close together but, if so, they gave the appearance of one crib. He denied the fact that the area under the structure had been "dangered off." The conveyor belt was operating at this time and the gallery structure was visibly vibrating. Although some vibration can be expected for a structure housing a conveyor belt, the inspector believed that the vibration he observed at that time was excessive and abnormal. He was afraid that the vibration would cause the crib to shake loose and of a total collapse of the structure due to its overall deteriorated condition. Inspector Williams testified that, "This is the worst deteriorated building that I've ever seen." If the structure collapsed, it would result in death or serious injury to miners. At that time he issued the order of withdrawal.

Consol called Leon Heck, general plant foreman, as its first witness. Mr. Heck testified that when he arrived at the preparation plant at about 2:30 a.m. on July 31, 1979, he inspected the area that had sagged and concluded that the problem was serious and could not be corrected immediately. He closed down the conveyor belt. He observed that both ends of the structure were still tightly connected to the walls of the building. Although he agreed that many of the angle bars were deteriorated, he believed that there was sufficient strength to support the structure. He also believed that the collapse was due to the deterioration and rusting of the gallery. He made no notes or drawings covering the number of angle bars that were separated or deteriorated. None of the miners complained to him about the safety of operating the conveyor belt after the cribs were installed. The only safety concerns expressed by any of the miners related to a fear of falling refuse from a 6 to 8 inch hole in the wall of the structure and falling Transite from the wall itself. Mr. Heck also testified that the conveyor belt was closed down during part of inspector Williams inspection and that the inspector walked on both sides of the belt. Thereafter, it was reactivated when the inspector went outside. Mr. Heck acknowledged the fact that the structure vibrated but stated that he had seen other galleries vibrate more than the one in controversy here. In any event, Mr. Heck stated his opinion that the structure was not dangerous at the time the withdrawal order was issued.

Consol next called Alan T. Olzer, an inspector escort employed by Consol, as a witness. Mr. Olzer essentially corroborated the testimony of Mr. Heck and added his opinions that the structure appeared to be stable prior to the arrival of the inspector and that he didn't believe anyone would be seriously injured.

The withdrawal order was terminated at 5:00 p.m. on July 31, 1979, after another crib was erected in the middle of the structure and two 85 pound rails were erected and welded under the higher side of the structure. On direct examination, Mr. Heck testified that the structure was subsequently replaced.

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, and arguments of counsel have been considered. The evidence shows that in the early morning hours of July 31, 1979, the elevated structure housing the refuse conveyor belt at Consol's Ireland Mine failed. At a point approximately 20 feet above ground level, the concrete floor of the structure "fell" or "sagged" about 1 foot for one quarter of the length of the structure. The initial status of this condition was described by Consol's general plant foreman as serious. After consultation with other Consol employees, it was decided to support the structure by constructing two cribs under the structure. One crib was constructed out of 6 foot railroad ties and the adjoining crib was constructed out of 30-inch railroad ties. Since the overall appearance of the cribs was that of a single crib, I do not find any significant inconsistency in the inspector's testimony that he saw only one crib.

The issue is whether an "imminent danger" existed after Consol completed voluntary repairs. It should be noted that for the purposes of this case, the definition of "imminent danger" in section 3(j) of the 1977 Act is identical to the definition of that term in the same section of the 1969

Federal Coal Mine Health and Safety Act. Therefore, it is appropriate to look to decisions of the Circuit Courts and the Interior Board of Mine Operations Appeals which have construed that term.

The Interior Board of Mine Operations Appeals, in a decision affirmed by the Seventh Circuit Court of Appeals, construed "imminent danger" as being a situation in which "a reasonable man would estimate that, if normal operations designed to extract coal in the disputed area should proceed, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger." Freeman Coal Mining Company, 2 IBMA 197, 212 (1973), aff'd Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, 504 F.2d 741, 745 (7th Cir. 1974).

In a case involving an imminent danger order, the Fourth Circuit Court of Appeals stated: "[t]he Secretary determined and we think correctly, that 'an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.'" Eastern Associated Coal Corporation v. Interior Board of Mine Operations Appeal, 491 F.2d 277, 278 (4th Cir. 1974), aff'g Eastern Associated Coal Corporation, 2 IBMA 128 (1973). See also Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, 523 F.2d 25 (7th Cir. 1975).

In UMWA District No. 31 v. Clinchfield Coal Company, 1 IBMA 31 (1971), the coal mine operator asserted that since it had voluntarily closed its mine prior to the issuance of an order of withdrawal, the order was of no moment. This argument was rejected by the Board which stated, "The purpose of a withdrawal order is not only to remove the miners but also to insure that they remain withdrawn until the conditions or dangers have been eliminated." Id. at 41.

In Eastern Associated Coal Corporation, 3 IBMA 303, 305 (1974), the Interior Board of Mine Operations Appeals held that "initiation of the abatement process on a voluntary basis, while laudable, does not in itself preclude the issuance of a section 104(a) [now section 107(a) under the 1977 Act] closure order where an inspector observes a condition or conditions constituting imminent danger, as that term is defined in the Act."

In the instant case, Consol had completed its voluntary temporary repairs to the gallery structure prior to the arrival of the MSHA inspector. The question to be decided is whether the condition of the structure, as repaired by Consol, constituted an imminent danger at the time the order of withdrawal was written. However, in order to properly evaluate the voluntary repairs, the underlying condition must be assessed. The undisputed evidence shows that there was a failure, "fall", or "sag" of the floor of an elevated structure at a coal preparation plant. This failure was initially evaluated by Consol's general plant foreman as serious. He ordered temporary repairs prior to an assessment by an engineer and a contractor whose employment was authorized by a Consol vice-president. The general plant foreman conceded that the failure was caused by deterioration and rusting inside the structure. Although two angle bars had been welded to the I beam after the failure, he admitted that there was additional deterioration to other joints of angle bars and the I beam. Inspector Williams was more precise in his testimony that of the 20 angle bars on the left side of the structure, half were deteriorated to the point that they had separated from the I beam on the floor. The cribs which had been constructed voluntarily by Consol did not fully support the sagged area. Inspector Williams testified to excessive vibration which was visible from ground level. During the initial failure, the wall of the structure broke causing a hole to open in the wall. There was a danger that refuse from the conveyor would fall through this hole. There was further danger that pieces of the Transite wall might fall. Inspector Williams testified that he believed the excessive vibration combined with the deteriorated condition of the structure could result in a total collapse. He did not believe that the cribbing constructed by Consol would prevent such a collapse.

It is conceded that in normal operation of the plant, employees frequently are inside and under the structure. Consol agrees that it did not "danger off" the interior of the structure but asserts that it "dangered off" most of the area underneath the structure. However, it concedes that a walkway was maintained through the "dangered off" area so that miners could enter and leave the plant. Whether Consol "dangered off" the area as it alleged is not dispositive of the instant case. This is so because the test to be applied is whether "the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner _if normal mining operations were permitted to proceed in the area_ before the dangerous condition is eliminated." (Emphasis supplied.) _Eastern Associated Coal Corporation_ v. _Interior Board of Mine Operations Appeals_, 491 F.2d 277, 278

(4th Cir. 1974). Thus, "if normal mining operations were permitted to proceed in the area," miners going under the structure would be exposed to debris falling from a height of approximately 20 feet.

The evidence establishes that a sudden and unexpected structural failure occurred in the early morning of July 31, 1979 at the Ireland Mine preparation plant. Consol voluntarily made some interim repairs pending a subsequent study by an engineer and a contractor. After completion of the repairs the condition of the structure was as follows: (1) ten of twenty welds between the angle bars and the beam on the left side of the gallery were broken; (2) the interior of the gallery was deteriorated and rusted; (3) there was a hole in the side wall of the gallery through which refuse from the conveyor could drop for a distance of twenty feet to the ground; (4) there was excessive vibration of the structure when the conveyor was operating; and (5) miners were required to be in and under the structure during normal mining operations.

The MSHA inspector testified that the structure in question was the worst deteriorated one that he had seen. Because of the overall poor condition of the structure, the excessive vibration during operation, and the failure of the voluntary repairs to provide adequate support, he concluded that an imminent danger existed. Consol did not present any expert testimony to rebut these charges. Its primary witness, Leon Heck, testified that he had experience as an electrician but not as a construction engineer. While Leon Heck and Alan Olzer testified that, in their opinion, the crib which Consol constructed provided adequate support for the structure, I find that the physical facts support the opinion of the MSHA inspector that it was just as likely as not that death or serious physical harm would occur due to a total collapse of the structure or from falling debris.

In conclusion, I find that MSHA has established, by a preponderance of the evidence, that an imminent danger existed at the time the order of withdrawal was issued.

ORDER

WHEREFORE, IT IS ORDERED that the Application for Review is DENIED and the subject withdrawal order is AFFIRMED.

James A. Laurenson, Judge

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FEB 20 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. DENV 79-155-PM A.C. No. 39-00055-05001
v.	:	Yates Shaft Mine
HOMESTAKE MINING COMPANY, Respondent	:	

DECISION

Appearances: Steven P. Kramer, Esq., Trial Attorney, Office of the Solicitor, Mine Safety and Health Administration, for Petitioner;
Timothy M. Biddle, Esq., Crowell & Moring, Washington, D.C., and Robert Amundson, Esq., Amundson & Fuller, Lead, South Dakota, for Respondent.

Before: Judge Fauver

This case was brought by the Secretary of Labor under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., for assessment of civil penalties for alleged violations of mandatory safety standards. The case was heard at Rapid City, South Dakota, on August 13, 1979. Both sides were respresented by counsel, who have submitted their proposed findings, conclusions and briefs following receipt of the transcript.

Having considered the evidence and contentions of the parties, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent, Homestake Mining Company, operated a gold mine known as the Yates Shaft, in Lawrence County, South Dakota, which produced gold ore for sales in or affecting interstate commerce.

Citation No. 328801

2. On March 20, 1978, Iver Iverson, a federal mine inspector, accompanied by the relief foreman, Horace Randel, inspected Respondent's crushing

plant at the Yates Shaft. The facility housed four conveyor belts in a large building about 10 stories high, 200 to 300 feet long, and 100 to 150 feet wide.

3. They traveled into the crusher room to the head of the No. 4 belt and walked down about 100 feet of steps that ran alongside the belt. At the bottom of these stairs was a cement floor and passages to the right and left. To the left was the No. 3 belt and to the right was a stairway down to the tail end of the No. 4 feeder belt. The tail pulley of the No. 4 belt, protected by a metal frame, was located in a small recessed area (about 8 x 10 feet) and was about 4 feet directly in front of the stairway, which was the only means of access to this area. Just past the tail pulley was a dead end.

4. The stairway consisted of three metal grating stairs and descended about 3 feet. Each step was about 10 inches wide and 40 inches long. On one side of the stairs was a handrail and on the other side a concrete wall. Overhead lighting was provided.

5. The steps were covered with an accumulation of fine and loose rock pieces about 1 inch to 1-3/4 inches large. The accumulation covered the steps at about a 45-degree angle from the the bottom to the top. Only the metal of the bottom portion of the middle step was at all visible through the accumulation of material.

6. The loose material came from the No. 3 conveyor where it dumped onto the No. 4 belt. The manner in which the material had settled and was packed on the stairs indicated that it had been there for some time. The condition created difficulty in walking down the stairs, and posed a hazard that someone using the steps might fall, including the hazard of falling forward into the metal frame around the tail pulley.

7. At 2:15 p.m., Inspector Iverson issued a citation to Respondent, reading in part:

> Stairway leading to the bottom of No. 4 feeder belt Yates crusher was covered with loose rock, loose material covered each step from front to back at approximately 45 degrees from horizontal. Three steps measured 10 inches wide, 40 inches long with each having a 8 inch drop, measured by a standard rule. Poor footing on step surface created a unsafe condition. Stairway was used by maintenance crew.

The citation was abated the following day.

8. There were three shifts per day, each with three men. One ran the crusher from the crusher platform, one removed chips from the belt, and the third did general cleanup work. In addition, from time to time crusher mechanics performed maintenance on the crusher and screens and greased the conveyors.

9. The cleanup man cleaned around the stairways and belts and through the travelways each shift. He would clean around the equipment in the cited area whenever he found it dirty. The crusher mechanics greased and checked the tail pulley about once a week.

10. Men used the plant's travelways routinely for maintaining the equipment, cleaning the travelways, and while supervising work activities. The travelways would also be used in the event of an injury to one of the crew.

11. The cleanup man would try to keep the cited stairway free from accumulations of loose material; however, a spillage could occur within a matter of a few minutes if a rock became lodged in the conveyor. When the conveyor was in operation, some spillage was expected and occurred frequently. The frequency of spillages was unpredictable and sometimes 2 or 3 hours could elapse without a spillage.

12. Rocks would occasionally become caught in the conveyor and cause a back up or spillage at the tail pulley. The excess load would ultimately trigger a mechanism to shut down the belt. When this occurred, the crusher's panel lights would be activated, indicating that debris was probably accumulating around the tail pulley.

13. This type of blockage and spillage would occur several times per shift depending on the amount of moisture in the rock and on how many rocks became caught in the hopper; it was very difficult to prevent completely.

14. The accumulation cited was left over from at least one prior shift.

15. A preshift examination on each shift consisted of the foreman traveling all the walkways and passageways and checking for safety conditions. No record of these examinations was made. A preshift examination of the cited area had not been made prior to the citation because the Government inspection was already in progress when the supervisor, Gene Pfarr, arrived.

16. Considering that the spillage was left over from at least one prior shift, management knew or reasonably should have known of the condition before it was found by the inspector.

Citation No. 328810

17. As part of its cut and fill mining sequence, Homestake constructs vertical shafts used as ore bins and adjacent manways between levels where mining is taking place. The purpose of the ore bins or "binlines" is to provide a vertical receptacle for loose ore to fall into as it is pulled to the top opening with a "slusher." The mouth of the shaft is 5' x 10' and of this the ore bin is 5' x 5'. The top of the ore bin is normally protected by two "grizzly bars" equally spaced across the opening; these prevent oversized pieces of ore from falling into the ore bin and act as a guard to

protect the miners from falling in. Also inside the shaft, and adjacent to the ore bin, is a manway containing ladders between the stope and the lower level where the ore is loaded. The ladders are offset on a series of landings about 20 feet apart.

18. The manway is separated from the ore bin by a solid wall. At the top of the shaft the ore is kept from falling into the manway by a "yankee bin." This is a wooden platform that begins over part of the opening of the manway and slants down at about 45 degrees into the ore bin. Most of the remainder of the manway opening is protected by lagging. Normally, only about 18" of the manway entry is open when the manway is used as a travelway.

19. As ore is mined in the stope, the height of the stope increases. Periodically, it becomes necessary to extend the ore bin and manway by adding a vertical extension at the top. This process, called "standing chimney timber," is performed by a small construction crew. After the chimney is installed backfill is placed around it to create a new working surface.

20. On March 30, 1978, construction was underway to extend an ore bin and manway in the 34D stope above the 4250 level. The Government did not prove that any other activity was occurring in the stope at the time.

21. The grizzly bars had been removed from the opening over the ore bin and all lagging boards had been removed from the opening above the manway.

22. In this particular stope, the ore bin descended about 80 feet to the 4250 level, where the ore came out at the bottom of the bin and was loaded into mine cars. The manway in the shaft consisted of offset ladders between landings about 20 feet apart vertically. A cable had been strung across the passageway on the 4250 level which led to the bottom entry of the manway. The cable had a sign on it indicating that the manway was closed. At the top of the manway, which was the only other entry to the manway, the first section of ladder had been removed.

23. At the time of the inspection, three of Respondent's employees were changing a broken cap at the top of the shaft in preparation for standing the chimney. As the shaft was being extended the top of the old timber would first be cleaned off. Six 11-foot, 10" x 10" posts would be placed on top of the old frame and braced. Caps and ties would be placed on the top and then the posts would be laced up with lacing and cement. A platform on which the men could work would also be built.

24. After all the muck was cleared out of the stope, the equipment would be torn down and the slusher would be placed in an area so that when the chimney was finished they could hoist it to the top before backfilling. The inspector estimated that it would take about 2 hours to change the broken cap, and the slusher would not have been used again until a new chimney section had been built and backfilled. There were several steps involved for backfilling and sometimes a stope would sit idle for quite a while. There

were about 100 chimneys at the Homestake mine. The chimney on the 34D stope was extended about once every 2 months and it required about three shifts to complete an extension.

25. At the time of the inspection, the stope had already been cleaned out and the slusher had been pulled up. There were two 11-foot, 10" x 10" posts leaning vertically against each other at about a 45-degree angle. The grizzly bars had been removed from the ore bin and the first 8-foot section of ladder in the manway had been removed near the top. Both halves of the shaft top were uncovered.

26. At 11:30 p.m., Inspector Iverson issued a citation (No. 328810) to the supervisor, which read in part:

> Miners were standing chimney timber over open raised top measuring 5 feet wide and 10 feet in length with an 18 inch by 5 foot manway opening on the north end, 30 feet to the 4250 level manway landing. The muck in the raise was at a 45 degree from horizontal which bottomed out 10 feet from the top of raise. Location of chimney & raise was in the 34D stope 4250 level 9 ledge.

The condition was promptly abated by placing a 3-inch thick wooden covering over the opening. The Government proved the above-quoted factual allegations.

27. It was the inspector's opinion that one of the 11-foot posts or broken material being handled by the workmen could have fallen down the unobstructed manway injuring someone on the 4250 level or inside the manway. He also believed that one of the men could have stumbled or fallen through the opening to the ore bin. There have been about three fatalities and three or four serious injuries (none while a chimney was under construction) when men, who were working around the opening or were passing over it, stepped backward or stumbled over a loose rock and fell into the opening.

28. At the time of the inspection, the grizzly bars were not in place, the lagging boards had been removed, and the men were not using safety belts. This condition created a hazard to the miners working on the chimney construction.

Citation No. 328401

29. On April 4, 1978, Stanley Sims, a federal mine inspector, inspected Homestake's Yates shaft. In the area of the No. 3 borehole machine at the 1700 level he cited Respondent for a violation of 30 CFR 57.12-18 as follows: "Principal Power Switches at the No. 3 borehole machine, 1700 level, 7 ledge, 46 crosscut, were not labeled to show what units they control."

30. At the time of this inspection, the drill was set up at the right-hand side of the drift. There were three switch boxes on the opposite side

of the drift about 15 feet from the drill. The boxes were not marked to show the units they controlled. The middle box was much larger than the other two. It had two parallel lines of the same color that went from the bottom of the box to the power pack of the borehole machine, but the path of these lines was not clear to the eye as going to the borehole machine. It also had a red plastic handle that controlled the power to the area. The box on the right, the welder's box, and the one on the left, a 110-volt transformer box that controlled the slusher lights, both fed off the large box. There were two other smaller boxes about the size of the welder's box in the drift about 6 feet from the power unit. At the location of the borehole machine, the drift was about 15 feet wide. In other respects, this was a standard size drift--about 90 feet high and 7 to 8 feet wide.

31. There was a separate control panel next to the borehole machine. The buttons on the panel were properly labeled and were not the subject of a citation. A red stop button on the panel could deenergize the machine. Although it would stop the machine, the circuit to the power pack could be re-energized by pushing the start button again. If the stop button were inoperable, the main power box would have to be used to shut off the machine. The borehole machine had no "dead man" control.

32. The inspector considered the switch boxes on the wall as the primary switches because they controlled the feed to the secondary controls. By sight, the inspector was unable to determine readily which units the boxes controlled. He assumed the larger box was the master because it usually was, and that the welding machine and slusher lights were controlled by the other two.

33. There was a danger that, if the driller were in an emergency and unable to reach the drilling machine control panel, others might not know how to shut off the power at the wall immediately because the wall boxes were not marked.

34. It was rare at this mine that a primary switch box would not be labeled to indicate which unit it controlled.

35. The borehole machine would be moved into an area that had been mined out and it would normally take about 3 weeks to drill a 150-foot raise. The power unit had a 200-horsepower electric motor that powered two hydraulic pumps. The helper usually greased the machine, placed the rods in the rocker, and performed normal maintenance duties. He was usually present during periods of drilling. About 6 months of training would be required to become competent in running the drill. One of the first things a helper would learn was how to turn off the borehole machine. He would be the first to turn it on at the start of a shift and the first to turn it off by throwing the switch on the large circuit box on the wall.

36. As of the day of the inspection, the Respondent had recently obtained another borehole machine and the crews were divided. The driller at the site had not yet chosen a permanent helper and was using laborers instead. No laborer had shown up for work that day.

37. The citation was abated by placing a stencil label: "borehole" on the large circuit breaker box.

DISCUSSION WITH FURTHER FINDINGS

Citation No. 328801

On March 20, 1978, Inspector Iverson charged Respondent with a violation of 30 CFR § 57.11-1, which provides: "Mandatory. Safe means of access shall be provided and maintained to all working places." The inspector observed that the stairway leading to the tail pulley of the No. 4 feeder belt was covered with loose material that created an unsafe condition.

The basic issue as to this citation is whether section 57.11-1 applies to stairways such as the one involved here.

Respondent contends that the standard applies only to travelways since section 57.11 is introduced by the heading, "Travelways and Escapeways." By definition, Respondent argues, for an area to be considered a travelway it must be used on a regular basis (which implies more than just being accessible). "Travelway" is defined in 30 CFR § 57.2 as a "passage, walk or way regularly used and designated for persons to go from one place to another." Respondent states that "the evidence was clear that the stairs were used on an occasional basis for the sole purpose of access to the tail pulley for infrequent maintenance work * * *."

Petitioner asserts that the stairway was a travelway within the meaning of section 57.2 because mechanics traveled the stairway to check and grease machinery in the course of their regular maintenance duties, supervisory personnel traveled this area, and cleanup people regularly traveled this area.

Respondent also asserts that even if the stairway leading to the tail pulley was a travelway, section 57.11-1 was not violated because the alcove was not a "working place". "Working place" is defined in section 57.2 as "any place in or about a mine where work is being performed." Relying on the present tense of the definition, Respondent contends the standard applies only while work is in progress and notes that there was no evidence that at the time of the citation work activity was taking place or would be taking place in the area in the immediate future.

Petitioner contends that an area in which regular maintenance, such as greasing and repair work, is performed is a "place in or about a mine where work is being performed."

Finally, Respondent asserts that section 57.11-1 does not apply to the stairs because a more specific section, 57.11-8, applies. Section 57.11-1 speaks generally of maintaining safe access to working places. Section 57.11-8, which is not a mandatory standard, specifically applies to stairways. That section reads: "Ladderways, stairways, walkways, and ramps should be kept free of loose rock and extraneous materials." Because section 57.11-8 is not a mandatory standard, Respondent contends, it cannot be enforced.

Petitioner agrees that section 57.11-8 is not a mandatory standard and states that it has since been revoked. Federal Register, August 17, 1979, Vol. 44, No. 161, p. 48530. Petitioner contends that section 57.11-1 was the proper standard to cite.

I conclude that at the time of the inspection, 30 CFR § 57.11-1 applied to the cited area.

The stairway was used about once a week by the crusher mechanics to maintain and grease the tail pulley. It was also inspected by supervisors and traveled by cleanup men whenever they cleaned a spill or an accumulation of loose materials. Those activities satisfy the requirement of regular use within the meaning of 30 CFR § 57.2. The stairway, by its nature, was designed for people to gain access from one area to another and was, therefore, a "travelway" under that section.

I also find that the tail pulley area was a "working place" as defined in 30 CFR § 57.2. During periods of maintenance and cleanup around the tail pulley, "work is being performed." In El Paso Rock Quarries, DENV 79-139-PM (December 17, 1979), Judge Moore said: "Inasmuch as employees are required to go into the tunnel to clean and repair, it is a workplace within the meaning of the regulation." I find Respondent's characterization of section 57.11-1 as requiring a safe means of access only "while work is in progress" incorrect.

Citation No. 328810

On March 30, 1978, Inspector Iverson charged Respondent with a violation of 30 CFR § 57.11-12 for failing to guard openings above the manway and ore bin. Section 57.11-12 provides: "Mandatory. Openings above, below, or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed."

The threshold issue with respect to this citation is whether the manway was a travelway at the time of the inspection. Respondent asserts that the manway was not a travelway because at the time of the citation the manway was (1) closed at the top where construction was underway and an 8-foot section of ladder had been removed and (2) closed at the bottom by a cable with a danger sign.

The inspector considered the manway to be a travelway within the meaning of 30 CFR § 56.11-12. He said the manway remained open around the top while construction was underway and the last step would be to close it off when backfilling started. He believed that while men were still working around the top the manway could be used as a travelway. At the time of the citation, it had not yet been closed off, and although he would not have expected anyone to descend into the manway (without first replacing the 8-foot section of ladder), he considered the manway subject to travel from above. There was no proof that such travel had ever occurred during this chimney extension or any other. The inspector did not inspect the bottom entry to the manway.

I conclude that the Government failed to prove that the manway was a "travelway" at the time of the citation. Use of the manway as a travelway was effectively stopped at the top by the fact of ongoing construction of the chimney, the removal of the 8-foot ladder section, and the existence and actual use of one or more alternative travelways, such as the one used by the inspector to get to the construction site. Respondent's evidence made a prima facie showing that, at the bottom of the manway, entry to the manway was effectively closed by placing a cable across it and hanging a danger sign. The inspector did not inspect or investigate conditions at the bottom entry; the Government's evidence did not rebut the prima facie showing made by Respondent. There was no solid evidence that miners had ever crossed a cable and danger sign to enter the bottom of the manway, during this chimney extension or any other.

Structurally, the 5' X 10' set of frame timber around which the construction crew was working consisted of two 5' X 5' openings. One of the openings was an ore bin; the other was what had been used as a manway and a Yankee bin. While the chimney was being extended, this half of the top portion became altered to a 5' X 5' opening that was not structurally or functionally intended to be a travelway. As mentioned, there was also a prima facie showing that, at the bottom of the manway, entry to the manway was effectively closed.

The openings at the top of the shaft were a sine qua non of a construction activity: standing chimney timber. Before the 11-foot timbers could be put in and braced, the coverings had to be removed and could not be replaced until this activity was completed.

The Government's evidence did show a dangerous construction activity (the absence of safety belts or lagging over a deep opening) but this did not prove a travelway violation as alleged in the citation. The safety standard on which the citation was based applied specifically to "openings above, below or near travelways." Because the construction sequence of standing chimney timber changed the structure and function of the manway to a construction site, there no longer existed a factual basis for the citation. Since the travelway standard did not apply to this activity, the relevant safety issue was whether the construction activity constituted an "imminent danger" under section 107(a). Since the Secretary did not allege an imminent danger, such issue is not before me.

Citation No. 328401

On April 4, 1978, Inspector Sims charged Respondent with a violation of 30 CFR § 57.12-8, which provides: "Mandatory. Principal power switches shall be labelled to show which units they control, unless identification can be made readily by location." The citation reads: "Principal power switches at the No. 2 borehole machine, 1700 level, 7 ledge, 46 X cut were not labelled to show what units they control."

The controlling issues as to this citation are whether the three circuit boxes were principal power switches and, if so, whether the units they controlled could be readily identified by their location.

Respondent asserts that there were two principal power switches at the location in question: The red "stop" button on the control panel controlled the hydraulic power for the borehole machine and the large circuit breaker box controlled the electrical power for the area. It contends that, by their location, these power switches were readily identifiable by "those miners who could reasonably be expected to be present when an emergency occurred and who might be called upon to stop the equipment."

I find that each of the circuit breaker boxes was a principal power switch, that the units they controlled could not be readily identified by their location, and that this condition created a safety hazard.

There were three circuit breaker boxes with power switches on the wall of the drift opposite the borehole machine and about 15 feet from the machine. The large box controlled three units--the borehole machine and the other two boxes; the two boxes controlled, respectively, the slusher lights and the welding machine. Each machine also had its own separate power switch. The borehole machine control panel included a prominent red stop or panic button to stop the machine immediately.

None of the wall boxes was marked. In an emergency, the borehole machine operator could be in danger but unable to reach the borehole control panel. In such an event, his safety could depend on the swiftness with which another person (whether his helper or any other person) could turn off the power at the wall. The existence of three boxes without markings could confuse someone as to the right switch to pull to cut off the power to the borehole machine. Such delay could be significant in an emergency.

CONCLUSIONS OF LAW

1. The undersigned judge has jurisdiction over the parties and the subject matter of the above proceeding.

2. Respondent violated 30 CFR § 57.11-1 by allowing loose material to accumulate on the stairway as alleged in Citation No. 328801. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of $100 for this violation.

3. Petitioner did not meet its burden of proving a violation as alleged in Citation No. 328810.

4. Respondent violated 30 CFR § 57.11-18 by failing to label principal power switches as alleged in Citation No. 328401. Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of $100 for the above violation.

ORDER

WHEREFORE IT IS ORDERED that (1) the charge based on Citation No. 328810 is DISMISSED, and (2) Homestake Mining Company shall pay the Secretary of Labor the above-assessed civil penalties, in the total amount of $200, within 30 days from the date of this decision.

William Fauver
WILLIAM FAUVER, JUDGE

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

February 20, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ex rel Billy Gene Kilgore, Applicant v. PILOT COAL COMPANY, Respondent	Complaint of Discharge, Discrimination, or Interference Docket No. VA 79-144-D

DECISION

Appearances: James H. Swain, Esq., and Kenneth L. Stein, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania for Applicant; J. Robert Stump, Esq., Sturgill & Stump, Norton, Virginia for Respondent.

Before: Chief Administrative Law Judge Broderick

Statement of the Case

The complaint filed in this proceeding on September 20, 1979, alleges that Billy Gene Kilgore was discharged by Respondent on or about May 18, 1979, because of activity protected under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). Pursuant to notice, a hearing on the merits was held in Norton, Virginia, on November 29, 1979. Billy Gene Kilgore and Donnie Brickley testified for the Applicant. Bruce Arwood, Darrell Baker, Mack Thacker and Kelly Fultz testified for the Respondent. Both parties were afforded the opportunity to submit post hearing briefs. To the extent that the contentions of the parties are not incorporated in this decision, they are rejected.

Statutory Provision

Section 105 of the Act provides in part:

> (c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the

exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

(2) any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violtion of this subsecton may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon appication of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such

> affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to his paragraph.

Issues

1. Whether Applicant Billy Gene Kilgore was discharged by Respondent on or about May 18, 1979?

2. If so, whether the discharge was because of activity protected under section 105 of the Act?

3. If Applicant was not discharged but resigned, was his resignation a constructive discharge?

4. If so, was it because of activity protected under section 105 of the Act?

Stipulation

The parties made the following stipulation on the record:

> Number one, Pilot Coal Corporation is a coal mining corporation doing business in the Commonwealth of Virginia and maintains its principal offices in Wise, Virginia.
>
> Number two, the corporation, as of this date, operates one underground mine and one surface mine. Surface mine No. 2 employs approximately [eight] employees on one production shift per day. The mine operations of the Respondent would be classified as "small". Total daily tonnage from the underground mine is 100 tons and 200 tons from the surface mine.
>
> Number three, Respondent has never been found guilty civilly or criminally of a violation of the discrimination provisions of the Federal Mine Safety and Health Act (Coal Mine Health and Safety Act).
>
> Number four, the Complainant, after termination did not seek reinstatement with the Respondent, and the Respondent did nothing to hinder the resolution of the instant matter.
>
> Number five, if Clarence A. Goode were called to testify he would state: (A) I have been employed by MSHA

(MESA) since January of 1971. (B) I have been a special investigator since October, 1977. (C) As a special investigator I investigate complaints under Section 105(c) and Section 110 of the 1977 Act. (D) I have received extensive training totaling 240 hours in regard to the execution of my duties as a special investigator. Further, I have conducted to date approximately twelve discrimination cases and have supervised other investigations of discrimination complainst conducted by my staff. These supervised investigations total about 85 cases.

Number six, in the instant case, from my investigation, I conclude that the alleged discrimination which may have taken place did not indicate a pattern or practice of any general discriminatory action by the Respondent.

Seven, in the event that the maximum penalty authorized under this Act were assessed against the Respondent, the payment of said penalty would not significantly affect the Respondent's ability to continue in business.

Number eight, if Respondent were called to testify, Kelly Fultz, corporation president, would testify that if the maximum penalty were assessed against the Respondent, it would significantly affect the Respondent's ability to continue in business. And that is the end of the stipulation.

Findings of Fact

1. The facts stated in the above stipulation are accepted and adopted as Findings of Fact.

2. Applicant was hired by Respondent in or about January, 1978, primarily to operate a front-end loader, but also to operate dozers and haulers.

3. On one occasion prior to May 1979, Applicant quit his job after spilling some oil on his person while waiting to fuel his front-end loader. After about a week, he returned, and was accepted back on the job.

4. On May 14, 1979, the front-end loader was having problems with its turbo charger and was removed from service until a needed part could be procured.

5. On May 15, 1979, Applicant was assigned to drive a 35 ton hauler truck. His only previous experience on such a vehicle was about 7 years previously when he intermittently drove a truck for about a month.

6. On May 15, 1979, Applicant drove the hauler, most of the driving being on level ground. He complained of the brakes and brake fluid was added. Applicant did not have any other difficulties driving the hauler on that day.

7. On May 16, Applicant was required to drive his truck up a newly-made incline to the loading point. Because there was not room to turn around at the loading point, the truck had to be backed up the incline. The road was soft and with an empty truck it was difficult to back up. Applicant was unable to back up the incline and was afraid of turning the truck over. After another driver hauled several loads, there was enough room to turn around at the loading point.

8. Applicant then drove up forward and hauled approximately six loads. He testified that he was having difficulty with the retarder brakes and was unable to slow the truck sufficiently to successfully negotiate the curve coming down the incline.

9. After he got his last load that day while turning, one wheel dropped into a hole and the other ran up on a rock. Applicant got out of the hauler and it was righted by another driver.

10. Applicant then told the mechanic and the foreman that he did not think he could operate the hauler safely and he was quitting.

11. The road was over 16 feet wide, had a berm on one side and the bank on the other. There was loose material where the road had been recently regraded.

12. The foreman attempted to persuade Applicant not to quit, and offered to put him on sick leave for the remainder of the day. Applicant refused the offer.

13. On May 18, 1979, Applicant returned to the mine, having filed a complaint with MSHA the previous day, and was told that the loader was not fixed and that driving the hauler was the only work available for him.

14. Applicant was not told on May 16 or May 18 that he was discharged.

15. Applicant Billy Gene Kilgore was not discharged from his employment by Respondent on or about May 18, 1979, but voluntarily left the employment.

16. Applicant quit his job in part because he was afraid of driving the hauler up and down the incline.

17. Neither the hauler nor the road were unsafe for normal operation.

18. The circumstances surrounding applicant's resignation did not constitute a constructive discharge.

Conclusions of Law

1. At all times relevant to this decision, Applicant and Respondent were subject to the provisions of the Federal Mine Safety and Health Act of 1977.

2. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

3. Applicant was not discharged, interfered with, or otherwise discriminated against because of activity protected under section 105 of the Act.

Discussion

The evidence establishes that Kilgore was not discharged but voluntarily quit his job. The evidence further establishes that there were no safety hazards related to the road or the hauler. He did not wish to continue work because he was fearful that he would be injured due to his lack of experience with the vehicle. I do not believe that refusal to work under these conditions is activity protected under 105(c) of the Act, or that it can be construed as a discharge or discrimination by Respondent forbidden by that section.

4. Since Respondent did not violate the Act as alleged in the complaint, no penalty is assessed.

ORDER

Based upon the above findings of fact and conclusions of law, the complaint is DISMISSED.

James A Broderick

James A. Broderick
Chief Administrative Law Judge

Distribution:

J. Robert Stump, Esq., Attorney for Pilot Coal Company, Sturgill & Stump, P.C., 464 Park Avenue, Norton, VA 24273 (Certified mail)

JAB James H. Swain, Attorney, Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified mail)

Mr. Billy G. Kilgore, Box 1241, Wise, VA 24293

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

(703) 756-6210/11/12

FEB 21 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. MORG 79-26-P A.O. No. 46-05452-03001
v.	:	No. 1 Strip Mine
COALTRAIN CORPORATION, Respondent	:	

DECISION AND ORDER

The parties have failed to show cause why the findings and conclusions contained in the attached Order of January 28, 1980, should not be entered as the decision and order of the Presiding Judge in this matter with respect to the seven citations in question.

Accordingly, it is ORDERED that said findings as to liability and the penalties warranted be, and hereby are, CONFIRMED and incorporated herein. It is FURTHER ORDERED that the operator pay the penalty finally assessed, $280.00, on or before Friday, March 14, 1980, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy

Joseph B. Kennedy
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SKYLINE TOWERS NO. 2, 10TH FLOOR
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JAN 23 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

COALTRAIN CORPORATION,
Respondent

Civil Penalty Proceeding

Docket No. MORG 79-26-P
A.O. No. 46-05452-03001

No. 1 Strip Mine

ORDER

The captioned petition for assessment of civil penalties was filed on November 22, 1978, and answered by the operator in a letter filed on December 21, 1978. Upon the operator's failure to fully comply with the requirements of the Pretrial Order of May 1, 1979, a default order issued assessing as final the reduced penalties recommended by counsel for the Secretary in his pretrial response filed May 25, 1979. The Commission directed the matter for review *sua sponte*, found there was no default, and by decision of November 30, 1979 remanded the matter to the Presiding Judge for further proceedings. On January 17, 1980, counsel for the Secretary responded to the order of December 11, 1979 directing that he address the defenses and mitigating circumstances raised by the operator.

An independent evaluation and *de novo* review of the parties' submissions discloses that there is no dispute as to the material facts, and that the record supports the following findings of fact and conclusions of law:

1. Citation No. 015441 alleges failure to provide a working, audible reverse alarm on a front end loader as required by 30 CFR 77.410. The operator admits the fact of violation, but asserts in mitigation that the machine operator was the only person allowed in the pit so as to assure that no miner would possibly be harmed by the lack of an alarm. Counsel for the

Secretary does not dispute this. Thus, the record supports a finding that the violation occurred as charged, that the operator was ordinarily negligent, and that the violation was non-serious. Accordingly, and after considering the other statutory criteria, I conclude that a penalty of $100.00 is warranted for the violation found.

2. Citation No. 015478 alleges failure to provide an approved sanitary toilet facility in a location convenient to the worksite as required by 30 CFR 71.500. The operator denies that a violation occurred, and maintains that a complete indoor bathroom was located within 50 feet of the haulage road leading to the worksite. The operator further claims that these facilities were approved by a previous inspector, and that they were also subsequently approved by the inspector who issued the instant Citation. Counsel for the Secretary does not deny this, but states merely that "the manner of compliance does not negate the existance of the violation," thus suggesting that a violation occurred solely because the facilities were not approved by the inspector at the time he issued the citation, notwithstanding his subsequent approval of the same facilities. I reject this contention. The record supports a finding that toilet facilities were provided in accordance with the requirements of the standard, and the citation should accordingly be vacated and the petition dismissed as to this charge.

3. Citation No. 015479 alleges failure to provide berms or guards on the outer bank of an elevated roadway as required by 30 CFR 77.1605(k). Counsel for the Secretary asserts that although the lack of berms or guards can create a serious risk of injury or death if equipment were to topple from the roadway, the operator was not negligent because winter snows had washed out the existing berms. The operator does not deny the fact of violation, but asserts that there were ruts made by the trucks at least 12 inches deep for the entire length of the roadway. Thus, the record supports a finding that the violation occurred as charged and that the violation was serious, but that the operator was not negligent since the condition was beyond its control. Accordingly, and after considering the other statutory criteria, I conclude that a penalty of $100.00 is warranted for the violation found.

4. Citation No. 015480 alleges failure to provide first aid equipment at or near a working place as required by 30 CFR 77.1707(a). Counsel for the Secretary asserts that although the operator was negligent in failing to provide such equipment, it is unlikely that serious injury or death would result from the violation. The operator does not deny the fact of violation, but states that the inspector arrived shortly after miners had moved to a new work site and that first aid equipment was located five minutes away at a previous site. Counsel for the Secretary does not dispute this. Thus, the record supports a finding that the violation occurred as charged and that the operator was negligent, but that the violation was non-serious. Accordingly, and after considering the other statutory criteria, I conclude that a penalty of $50.00 is warranted for the violation found.

5. Citations Nos. 015481 and 015483 allege failure to post safety regulations in conspicuous locations throughout the mine as required by 30 CFR 77.1708. Counsel for the Secretary maintains that this failure could result in injuries to the miners, and that the operator should be aware of the requirement and was therefore ordinarily negligent. The operator maintains that the subject mine employs only five miners and that the safety regulations were posted at the company garage where all personnel saw them each day. Since the standard apparently contemplates that safety regulations be posted at more than one conspicuous location, I find that the violations alleged did in fact occur. However, the record supports further findings that the operator did in fact have the safety regulations conspicuously posted at one place, and that the violations are purely technical in nature involving no negligence on the part of the operator. Accordingly, and after considering the other statutory criteria, I conclude that a penalty of $5.00 is warranted for the two violations found.

6. Citation No. 015487 alleges that compressed gas cylinders were lying on the ground and not secured in a safe manner as required by 30 CFR 77.208(d). Counsel for the Secretary maintains that failure to protect and secure these cylinders could result in serious injury, and that the operator was ordinarily negligent since the condition was obvious. The operator does not deny the fact of violation, but asserts that the cylinders were empty and not in use. Thus, the record supports findings that the violation occurred as charged, that

the operator was ordinarily negligent, and that the condition was non-serious and remote in that the only hazard presented was one of falling or tripping over the cylinders. Accordingly, and after considering the other statutory criteria, I conclude that a penalty of $25.00 is warranted for the violation found.

I further find that because there is no triable issue of fact, an evidentiary hearing is unnecessary to a prompt, just and practical disposition of this matter. *Reliable Coal Co.*, 1 IBMA 50, 65 (June 10, 1971); *Mitchell v. National Broadcasting Co.*, 533 F.2d 265, 271 (2d Cir. 1977); *Bell Telephone Company of Pa. v. FCC*, 503 F.2d 1250, 1267, n. 25 (3rd Cir. 1974), *cert*. *den*. 422 U.S. 1026, *reh*. *den*. 423 U.S. 886 (1975).

Accordingly, it is ORDERED that on or before Wednesday, February 13, 1980, the parties SHOW CAUSE why the foregoing findings as to liability and the penalties warranted should not be entered as the decision and order of the Presiding Judge in this matter with respect to the seven citations in question.

Joseph B. Kennedy

Joseph B. Kennedy
Administrative Law Judge

Distribution:

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Glenn C. Larew, President, Coaltrain Corporation, P.O. Box 128, Newburg, WV 26510 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

FEB 22 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	Civil Penalty Proceeding
v.	DOCKET NOS. WEST 79-214-M and WEST 79-279-M A/O Nos. 45-00572-05002 and 45-00572-05003
ACME CONCRETE COMPANY, Respondent.	Mine: Acme Pit and Plant

APPEARANCES:

Rochelle Kleinberg, Esq., Office of Robert A. Friel, Regional Solicitor, United States Department of Labor, Seattle, Washington
for the Petitioner,

Kevin Bredesen, Safety Coordinator and E.J. Ziegler, Plant Supervisor, appearing pro se,
for the Respondent.

Before: Judge John J. Morris

DECISION

Petitioner charges Respondent failed to secure gas cylinders and failed to provide a backup alarm for its equipment. Petitioner asserts the cited conditions violate standards promulgated under the authority of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976), (amended 1977).

ISSUES

The issue is whether any violations occurred.

CASE NO. WEST 79-214-M
CITATION 345301

This citation alleges a violation of 30 CFR 56.16-5.[1]

The uncontroverted evidence establishes the following facts.

1. Three oxygen cylinders were outside Acme's grease storage building (Tr 20, Exhibit P6).
2. One of the cylinders was unsecured; it could tip over, rupture, and rocket off (Tr 22).
3. The cylinder, purchased commercially, was delivered by a vendor just prior to the inspection (Tr 35,46).
4. The cylinders, 50 feet from the plant office, are to be secured by the vendor, however, the vendor had not secured them on two or three prior occasions (Tr 46,48).

Acme contends the events involving unsecured cylinder were outside of its control.[2]

I reject Acme's argument. The fact that the vendor left the two cylinders unsecured on two prior occasions are sufficient facts to alert Acme to the likelihood of a violation. The obligations imposed by the Federal Coal Mine Act cannot be delegated to another by contract, cf Frohlich Crane Service, Inc., v OSHRC 521 F2d 628, (10th Cir., 1975); Central of Georgia Railroad Company v OSHRC 576 F2d 620, (5th Cir., 1978).

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[1] The cited standard reads as follows:

> 56.16-5 Mandatory. Compressed and liquid gas cylinders shall be secured in a safe manner.

[2] This conclusion was reached by the inspector and entered in his report (Tr 35,R1).

CASE NO. WEST 79-279-M
CITATION 345271 and 345272

These citations allege violations of 30 CFR 56.9-87.[3]

The uncontroverted evidence establishes the following facts.

5. Acme's 980 loader was being operated without a backup alarm and without a person acting as an observer (Tr 9).
6. On the loader, the driver sits to the front and the engine is to the rear (Tr 12,13).
7. A driver in his position could not see a person as close as 3 to 4 feet from the rear of the vehicle (Tr 16,19,P-5).
8. The inspector observed one or two workers in the vicinity of the loader (Tr 12,23-24,36-37).
9. The 966 loader was not equipped with a backup alarm nor was there an observer available (Tr 17).
10. One or two workers were in the area of the 966 loader; the 966 loader is similar in design but smaller than the 980 loader (Tr 17-18,24-27,36-37, P-5).

Acme contends no violations occurred since the operator's view was not obstructed. In addition, Acme argues, in effect, that there was a lack of employee exposure since no employees, other than the operator, were working in the cited areas.

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[3] The cited standard provides:

> 56.9-87 Mandatory. Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

Acme's first contention is not supported by the record. The rebutted testimony of the compliance officer establishes the limitations of the operator's view (Fact's paragraph 7). In addition, photograph P-5 confirms this testimony.

Acme's second contention is rejected. Employee exposure to a prohibited hazard is an essential element of MSHA's proof.

In the evidence presented here there is such exposure.

Concerning the 980 loader: The loader operator, as well as Acme's truck drivers, can load in this area (Tr 44-46). Exposure arises when workers leave their trucks, an event observed "quite often" by the inspector (Tr 24-27).

Concerning the 966 loader: A loader was stuck and the inspector observed a worker fastening a 10 foot cable to the disabled vehicle so it could be moved (Tr 25-26,32-34). Even though the operator of the 966 loader would generally be isolated from any other workers, the described circumstances constitute exposure to the involved employee.

JURISDICTION

The parties concede jurisdiction (Tr 6).

FINDINGS OF FACT

I find the facts as outlined in Paragraphs 1 through 10 of this decision.

CONCLUSIONS OF LAW

1. Respondent violated 30 CFR 56.16-5 and Citation 345301, (Case No. West 79-214-M) should be affirmed. (Facts 1-4.)

2. Respondent violated 30 CFR 56.9-87 and Citations 345271 and 345272, (Case No. West 79-279-M) should be affirmed. (Facts 5-10.)

Based on the foregoing findings of fact and conclusions of law, I enter the following:

ORDER

1. In Case No. West 79-214-M, Citation 345301 and the proposed penalty of $38 are affirmed.
2. In Case No. West 79-279-M, Citations 345271 and 345272 and the proposed total penalty of $228 are affirmed.

John J Morris

John J. Morris
Administrative Law Judge

Distribution:

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Kevin Bredesen, Safety Coordinator, Acme Concrete Company, Box 2503 Terminal Annex, Spokane, Washington 99220

E. J. Ziegler, Plant Supervisor, Acme Concrete Company, Box 2503 Terminal Annex, Spokane, Washington 99220

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 25 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. HOPE 79-197-P A/O No. 46-01863-03003
v.	:	
ISLAND CREEK COAL COMPANY, Respondent	:	Pond Fork Mine

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
William K. Bodell, II, Esq., Island Creek Coal Company, Lexington, Kentucky, for Respondent.

Before: Judge Cook

I) Procedural Background

On January 16, 1979, the Mine Safety and Health Administration (Petitioner) filed a petition for assessment of civil penalty against Island Creek Coal Company (Respondent) in the above-captioned proceeding. The petition was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a)(1978)(1977 Mine Act), and alleges violations of two provisions of the Code of Federal Regulations. An answer was filed on February 12, 1979.

Notices of hearing were issued on June 19, 1979 and July 13, 1979. A continuance was granted at the Respondent's request on July 5, 1979. The hearing was held on August 16, 1979 in Bluefield, West Virginia. Representatives of both parties were present and participated.

A schedule for the submission of posthearing briefs was agreed upon after the presentation of the evidence. However, difficulties experienced by counsel necessitated a revision thereof. Under the revised schedule, briefs were due by October 19, 1979, and reply briefs were due by November 5, 1979.

The Respondent and the Petitioner filed posthearing briefs on October 19, and October 25, 1979, respectively. The Respondent filed a reply brief on November 5, 1979, and the Petitioner filed a response to the reply brief on November 13, 1979. 1/

II Violations Charged

Citation No.	Date	30 CFR Standard
20053	6/19/78	75.302-1
21804	7/13/78	75.200

III Evidence Contained in the Record

A) Stipulations

The stipulations entered into by the parties are set forth in the findings of fact, infra.

B) Witnesses

The Petitioner called as its witness Billy R. Browning, an MSHA inspector.

The Respondent called as its witnesses Arvel Gartin, a section foreman at the subject mine; Tony Turyn, director of safety for the Respondent's Island Creek Division; and Douglas White, the day shift mine foreman at the subject mine.

C) Exhibits

1) The petitioner introduced the following exhibits into evidence:

M-1 is a copy of both Citation No. 20053, June 19, 1978, 30 CFR 75.302-1 and the termination thereof.

M-2 is a document styled "Assessed Violation History Report-Two Year Summary by Mine" compiled by the Directorate of Assessments. This document

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1/ The Respondent argues that the Petitioner's brief should not be considered in making a decision in the instant case because it was not timely filed. (Respondent's Reply Brief, pg. 1). The Petitioner asserts that such action would be inappropriate because the Respondent has not alluded to having suffered prejudice as a result of the tardy filing. (Petitioner's Response to Respondent's Reply Brief, pg. 1)

In light of the absence of demonstrable prejudice resulting from the late filing, the arguments raised in the Petitioner's posthearing brief will be considered in deciding the instant case.

contains information on the history of violations for which the Respondent had paid assessments between July 20, 1976 and July 19, 1978.

M-3 is a copy of both Citation No. 21804, July 13, 1978, 30 CFR 75.200 and the termination thereof.

M-4 is a drawing produced during the hearing by Inspector Browning during his testimony relating to Citation No. 21804, July 13, 1978, 30 CFR 75.200.

2) The Respondent did not introduce any exhibits into evidence.

IV Issues

Two basic issues are involved in the assessment of a civil penalty (1) did a violation of the 1977 Mine Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V Opinion and Findings of Fact

A) Stipulations

1) Island Creek Coal Company owns and operates the Pond Fork Mine and both are subject to the jurisdiction of the 1977 Mine Act. (Tr. 5)

2) The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 105 of the 1977 Mine Act. (Tr. 5).

3) Inspector Billy R. Browning was a duly authorized representative of the Secretary at all times relevant hereto (Tr.5).

4) Island Creek Coal Company is a large operator and a civil penalty assessment herein will not affect its ability to continue in business. (Tr. 5).

5) Island Creek Coal Company mines over ten million tons per year, and the Pond Fork Mine mines from fifty to sixty thousand tons a year. (Tr. 89).

B) Occurrence of Violations, Negligence, Gravity and Good Faith

1) Citation No. 20053, 6/19/78, 30 CFR 75.302-1

MSHA Inspector Billy R. Browning conducted a spot inspection of the Respondent's Pond Fork Mine on June 19, 1978 (Tr. 10-12). He arrived at the mine at approximitely 3:50 p.m. and entered the mine with the evening shift at approximately 4:00 p.m. (Tr. 12-13). He testified that the shifts at the Pond Fork Mine change at 4:00 p.m. (Tr. 13). He arrived on the section at approximately 4:30 p.m. (Tr. 21). At 4:55 p.m., he issued the subject citation alleging a violation of mandatory safety standard 30 CFR 75.302-1 as follows:

> The line brattice and check curtain were not properly installed and maintained from the last open crosscut out to within 10 feet of the point of deepest penetration in the 014-04 unit in that the line brattice was terminated 20 feet outby the point of deepest penetration in the No. 6 entry, 27 feet outby the point of deepest penetration in the No. 5 entry and the line brattice and check fly were nailed to the roof in the No. 3 and 4 entries.
>
> (Exh. M-1; see also Tr. 13).

The inspector's testimony is in accord with the statements contained in the citation. (Tr. 13-14, 30-35). In addition, he testified that the check flies and line brattices were rolled up and nailed to the roof in the Nos. 3 and 4 entries. (Tr. 31-33). As relates to the No. 3 entry, they were rolled up for a distance of approximately 32 to 34 feet (Tr. 31-32). His testimony indicates that line brattice had been installed to within 8 feet of the "toe of the coal." (Tr. 31). As relates to the No. 4 entry, they were rolled up for a distance of approximately 30 feet (Tr. 33-34).

The ventilation plan identified the area as a working section (Tr. 13.)

The testimony of both Inspector Browning and Mr. Arvel Gartin, the evening shift section foreman, establishes that coal was not being cut, mined or loaded from the working faces in any of the four subject entries between the time the inspector and the evening shift miners arrived on the section and the time the citation was issued. (Tr. 22, 29, 36, 43). In fact, there was no power on the section while the inspector was present (Tr. 36, 41-42).

The first question presented is whether the above-stated facts establish a violation of 30 CFR 75.302-1 occurring on the June 19, 1978, second shift at the Pond Fork Mine. For the reasons set forth below, I answer this question in the negative.

The Petitioner argues that an interrelationship exists between 30 CFR 75.302-1 and 30 CFR 75.302(a) whereby the former must be interpreted as defining an area of the mine and not time periods during the mining process. The Petitioner correctly observes that 30 CFR 75.302(a) is merely a verbatim restatement in the Code of Federal Regulations of section 303(c)(1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 863(c)(1) (1970) (1969 Coal Act). Section 303(c)(1) of the 1969 Coal Act was unchanged by the enactment of the 1977 Mine Act. Compare 30 U.S.C. § 863(c)(1) (1970) and 30 U.S.C. § 863(c)(1) (1978). According to the Petitioner, the statutory provision requires the continuous use of line brattice inby the last open crosscut. The Petitioner then argues that the sole construction of 30 CFR 75.302-1 consistent with the statutory language is that 30 CFR 75.302-1 further clarifies the distance requirements for hanging line brattice in areas where coal is being cut mined or loaded. (Petitioner's Posthearing Brief, pp. 5-7). Thus, according to the Petitioner, a violation of 30 CFR 75.302-1 can occur absent actual cutting, mining or loading operations at a given working face.

The Respondent disagrees, arguing that 30 CFR 75.302-1 describes not only an area of the mine, but also specifies activities which must be in progress before the 10 foot rule applies. The Respondent argues that the regulation is clear and requires little interpretation. The Respondent submits that the purpose of the regulation is to assure that cutting, mining or loading, which constitute activities requiring greatest protection from dust and methane concentrations, are not conducted when curtains are farther than 10 feet from the face. According to the Respondent, the regulation seeks to assure proper ventilation at the face during these crucial operations, not at all times. (Respondent's Posthearing Brief, pp. 2-3; see also Respondent's Reply Brief).

The Petitioner characterizes the Respondent's interpretation as misconstruing the intent of the two provisions and as directly contrary to the Congressional directive that newly promulgated regulations cannot reduce existing levels of protection. (Petitioner's Posthearing Brief, pg. 7 citing Sen. Rep. No. 95-181, 1977 U.S. Code Cong. and Admin. News 3401 at 3411); see also section 301(a) of the 1969 Coal Act, 30 U.S.C. § 861(a) (1970) and section 301(a) of the 1977 Mine Act, 30 U.S.C. § 861(a) (1978).

Although an interrelationship exists between the two provisions, I disagree with the Petitioner's interpretation of that interrelationship. I conclude that the ten foot requirement contained in 30 CFR 75.302-1 applies only when coal is actually being cut, mined or loaded from the working face. 2/

30 CFR 75.302 addresses ventilation of the working face and provides, in part, as follows:

> (a) Properly installed and adequately maintained line brattice or other approved devices shall be continuously used from the last open crosscut of an entry or room of each working section to provide adequate ventilation to the working faces for the miners and to remove flammable, explosive, and noxious gases, dust, and explosive fumes, unless the Secretary or his authorized representative permits an exception to this

---

2/ For a similar interpretation see United States Steel Corporation, MSHA and United Mine Workers of America, Docket Nos. BARB 79-276 and 79-277 (August 10, 1979, Judge Forrest E. Stewart).

> requirement, where such exception will not pose a hazard to the miners. When damaged by falls or otherwise, such line brattice or other devices shall be repaired immediately.

30 CFR 75.302-1, addresses the installation of line brattice and other devices and provides, in part, as follows:

> (a) Line brattice or any other approved device used to provide ventilation to the working face from which coal is being cut, mined or loaded and other working faces so designated by the Coal Mine Safety Manager, in the approved ventilation plan, shall be installed at a distance no greater than 10 feet from the area of deepest penetration to which any portion of the face has been advanced unless a greater distance is approved by the Coal Mine Safety District Manager of the area in which the mine is located.

Thus, the two provisions collectively establish the following general requirements: Properly installed and adequately maintained line brattice or other approved devices must be continuously used from the last open crosscut of an entry or room of each working section 3/ to provide adequate ventilation to the working faces. 4/ However, when coal is actually being cut, mined or loaded from the working face, the line brattice or other approved device used to provide ventilation to that working face must be installed at a distance no greater than 10 feet from the area of greatest penetration to which any portion of the face has been advanced.

30 CFR 75.302-1(a) simply sets forth a detailed requirement for the installation of the line brattice in relation to working faces from which coal is actually being cut, mined or loaded. It cannot be concluded that the regulation, by delimiting its coverage to areas of actual cutting, mining or loading, violates the Congressional mandate prohibiting the promulgation of regulations according less protection to the miners than is provided by the interim mandatory safety standards.

In view of the fact that neither cutting, mining nor loading of coal had occurred on the second shift, it cannot be found that a violation of 30 CFR 75.302-1 occurred on the second shift. 5/

3/ "'Working section' means all areas of the coal mine from the loading point of the section to and including the working faces." 30 CFR 75.2(g)(3).
4/ "'Working face' means any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle." 30 CFR 75.2(g)(1).
5/ It is possible that a violation of 30 CFR 75.302(a) (statutory provision) existed. But it is unnecessary to decide such an issue because the petition for assessment of civil penalty does not allege a violation of the statutory provision.

The second question presented is whether the allegations contained in the petition for assessment of civil penalty are sufficient to charge a violation of 30 CFR 75.302-1 occurring on the June 19, 1978, day shift.

The inspector testified that the cited conditions in the four subject entries had been present while coal was being produced on the June 19, 1978, day shift. He did not observe any mining activities on the day shift because he was not present in the mine at that time. (Tr. 24). Rather, he testified as an expert basing his opinion on inferences drawn from observations in the four entries. (Tr. 14-15, 24-25, 27-28, 30-35).

The Respondent contends that the allegations contained in the petition are inadequate to allege a violation occurring on the prior shift. (Respondent's Posthearing Brief, pp. 4-5).

It is clear that the Petitioner's case centered on a violation allegedly occurring on the second shift as evidenced by both the evidence presented at the hearing and the arguments set forth in the Petitioner's posthearing brief. Counsel for the Petitioner argued only at the hearing that if actual cutting, mining or loading is required to support a violation of 30 CFR 75.302-1, then the reasonable inferences drawn from the inspector's observations would support a finding that a violation had occurred on the prior shift. (Tr. 92-97). The argument is not specifically reasserted in the Petitioner's brief.

The Interior Board of Mine Operations Appeals observed that timely and adequate notice is necessary to enable a mine operator "to determine with reasonable certainty the allegations of violations charged so that it may intelligently respond thereto and decide whether it wishes to request formal adjudication." Old Ben Coal Company, 4 IBMA 198, 208, 82 I.D. 264, 1974-1975 OSHD par. 19,723 (1975). Additionally, section 5(b)(3) of the Administrative Procedure Act, 5 U.S.C. §554(b)(3) (1978), provides that "[p]ersons entitled to notice of an agency hearing shall be timely informed of * * * the matters of fact and law asserted."

The Respondent was entitled to notice sufficient for it to determine with reasonable certainty the violation charged.

The citation sets forth the time of issuance as 4:55 p.m., June 19, 1978; i. e., approximately 55 minutes into the second shift. No statement is made in the citation alleging that cutting, mining or loading occurred on the day shift in the face areas of the four subject entries with the line brattices and check flys installed at a distance greater than ten feet from the area of deepest penetration. Since the allegations contained in the citation are incorporated by reference into the petition for assessment of civil penalty, the petition can only be construed as alleging a violation occurring on the second shift. Indeed, the evidence adduced by the Respondent was directed toward disproving a violation on the second shift. A review of all the evidence reveals that the question of whether a violation occurred on the day shift was not tried with the express or implied consent of the parties.

Accordingly, the petition for assessment of civil penalty will be dismissed as relates to Citation No. 20053, 6/19/78, 30 CFR 75.302-1.

2) Citation No. 21804, 7/13/78, 30 CFR 75.200

MSHA inspector Billy R. Browning visited the Respondent's Pond Fork Mine on July 13, 1978 to begin a regular inspection of the mine (Tr. 55-56). He rode into the mine on a jeep and was accompanied by Mr. Douglas White, the day shift mine foreman. (Tr. 56, 75-76). As they were riding through the mine, the inspector observed that a roof fall had occurred in the crosscut in which stopping No. 34 was located (Tr. 57, 63). The roof fall had been corrected by the mine operator sometime prior to the inspector's arrival in the area. (Tr.59-60). The fall area was supported according to the minimum requirements of the roof control plan, but a new area of deterioration had developed (Tr. 71). The inspector observed indications that a fresh crack had developed, extending to a point 25 or 27 feet inby the fall area along the right rib. (Tr. 57-59, 65). He testified that the crack was tied "directly into the fall area" and that the roof over the track was a somewhat hazardous area as a result of the crack (Tr. 65). A visual estimate revealed that loose and broken roof was present for a distance of six to twelve inches beyond each side of the crack. (Tr. 69-70). The inspector's observations led him to conclude that additional support was required (Tr. 60). The subject citation was issued at 9:30 a.m. encompassing both the roof over the track to the left of the fall area and the crack in the rib (Tr. 65), and states the following:

> The roof over the main line track was inadequately supported in the crosscut intersection located at the No. 34 stopping in that loose and broken roof was present along the right side and signs of cutting was present for a distance of [25 or 27] feet.

(Exh M-3; Tr. 58).

The above-cited conditions observed along the track haulageway (Tr. 61) allegedly constitute a violation of 30 CFR 75.200, which provides, in pertinent part, as follows: "The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs." It is not alleged that the cited conditons constituted a violation of the Respondent's roof control plan. (Tr. 60). However, it is well established that where the evidence is sufficient to establish that the roof or ribs of a mine were not adequately supported to protect persons from falls, it is unnecessary to prove a violation of the roof control plan in order to sustain a violation of 30 CFR 75.200. In Zeigler Coal Company, 2 IBMA 216, 80 I.D. 626, 1973-1974 OSHD par. 16,608 (1973), the Interior Board of Mine Operations Appeals held "that an operator is under a duty to maintain a safe roof irrespective of any roof control plan and that the failure to do so constitutes a violation of [30 CFR 75.200]." 2 IBMA at 222.

There was no substantial disagreement between Inspector Browning and Mr. White as to the existence of the crack. In fact, Mr. White testified that the crack existed as designated by the inspector on Exhibit M-4. In additition, I am unable to detect any meaningful discrepancies in their testimony material to the issue of whether the conditions described by the inspector establish the area as one in need of additional support. The inspector testified that the crack was an indication of roof deterioration (Tr. 66). I find the inspector's assessment a credible one, especially in view of the presence of loose and broken roof for a distance of 6 to 12 inches on each side of the crack.

Mr. White candidly admitted that it would have been possible for the roof to collapse in the near future, but qualified his assertion by indicating that it would be difficult to affirmatively state that it would or would not have collapsed (Tr. 79). However, he testified that if he had observed the condition without the inspector present, he would have installed supports (Tr. 79). I interpret this testimony as a further indication that prudent mining practice required the installation of additional supports in the cited area.

Therefore, I find that the conditions described by the inspector existed as set forth in both the citation and his above-noted testimony, and that the cited area was not supported or otherwise controlled adequately to protect persons from falls of the roof or ribs.

Accordingly, I conclude that a violation of 30 CFR 75.200 has been established by a preponderance of the evidence.

Negligence of the Operator

The inspector testified that he did not feel that the condition existed as a result of a lack of due diligence or negligence on the operator's part (Tr. 60). He based his opinion on the apparent freshness of the crack. He did not believe that it had been in existence for a very long period of time (Tr. 61). Mr. White shared the inspector's view that the crack appeared fresh, basing his opinion on the absence of rock dust or float dust on it (Tr. 83). He could not express an opinion as to how long the condition had been present (Tr. 83).

Operator negligence is established when the evidence or the inferences drawn therefrom establish that the operator knew or should have known of the condition. The testimony of both Inspector Browning and Mr. White fails to establish that the Respondent had actual knowledge of the condition. Mr. White testified that he did not know the crack existed prior to observing it (Tr. 77). In addition, the inspector testified that if the Respondent had known about the condition it would have undertaken corrective action. He based his opinion on his experience in inspecting the Pond Fork Mine (Tr. 64-65).

Accordingly, I conclude that there has not been a showing of negligence on the part of the Respondent.

Gravity of the Violation

The length of the crack and the condition of the roof adjacent to the crack have been set forth previously.

As noted previously, the inspector testified that the crack in the rib was tied directly into the fall area (Tr. 65). The inspector testified that the area of the fall was not extremely large. He testified that it was a normal roof fall, entry wide, 4 or 5 feet thick and ten or 15 feet long (Tr. 63). The fall area had been cribbed off (Tr. 63-64). Thus, the fall area was behind the cribs, not in the travelway (Tr. 62-63). Specifically, the inspector testified that when he arrived in the cited area he observed that three cribs had been installed and 3 to 5 additional crossbars had been installed across the roof with 5 by 7 or 6 by 8 square-sawed posts on the left side of the track (Tr. 59-60, 66-70, Exh M-4). The inspector further testified that this support had been installed at the time of the fall (Tr. 59-60).

Mr. White testified that the roof above the main track was in "pretty fair shape." (Tr. 78). He further testified that a hairline crack was present in the roof over the main track extending a bit past where the crossbars had been installed (Tr. 79).

The inspector indicated that the condition was potentially serious. Defective roof is in itself, a dangerous condition (Tr. 61).

The cited area was along a track haulageway. All persons entering the mine's underground workings via the track entry would have been exposed to the condition (Tr. 61).

Accordingly, I conclude that the violation was very serious.

Good Faith in Attempting Rapid Abatement

The condition was abated by installing four 42-inch cribs along the right side of track and seven 5-inch by 7-inch by 14 foot headers against the roof over the track. The headers were supported by five-by 7-inch square-sawed posts located on the left side of the track (Exh M-3, Tr. 58-59). The inspector opined that management took extraordinary steps to abate the violation, based on the fact that Mr. White immediately ordered the supply crew to load, transport and install cribs, crossbars and posts (Tr. 61-62).

Accordingly, I conclude that the Respondent demonstrated good faith in attempting rapid abatement.

C) History of Previous Violations

Exhibit M-2 is a computer printout compiled by the Directorate of Assessments containing information on the history of previous violations for which the Respondent had paid assessments from July 20, 1976 to July 19, 1978, as relates to the Pond Fork Mine.

During this two year period, the Respondent had paid assessments for 113 violations. Forty-two occurred in 1976, 42 occurred in 1977 and 29 occurred in 1978.

D) Appropriateness of Penalty to Operator's Size

Island Creek Coal Company Mines over 10 million tons per year, and the Pond Fork Mine mines from fifty to sixty thousand tons a year (Tr. 89). Furthermore, the parties stipulated that Island Creek Coal Company is a large operator (Tr. 5).

E) Effect on Operator's Ability to Continue in Business

The parties stipulated that the assessment of any penalty in this proceeding will not affect the Respondent's ability to continue in business (Tr. 5). Furthermore, the Interior Board of Mine Operations Appeals has held that evidence relating to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). Therefore, I find that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

IV Conclusion of Law

1. Island Creek Coal Company and its Pond Fork Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the Act, this Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. MSHA Inspector Billy R. Browning was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the citations which are the subject matter of this proceeding.

4. The violation charged in Citation No. 21804, 7/13/78, 30 CFR 75.200, is found to have occurred as alleged.

5. The violation charged in Citation No. 20053, 6/19/78, 30 CFR 75.302-1 is found not to have occurred as alleged.

6. All of the conclusions of law set forth in Part V of this decision are reaffirmed and incorporated herein.

VII Proposed Findings of Fact and Conclusion of Law

Petitioner and Respondent submitted posthearing briefs. Respondent submitted a reply brief, and Petitioner submitted a response to the reply brief. Such submissions, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII Penalties Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that assessment of a penalty is warranted as follows:

Citation	Date	30 CFR Standard	Penalty
21804	7/13/78	75.200	$200

ORDER

The Respondent is ORDERED to pay a civil penalty in the amount of $200 within 30 days of the date of this decision.

IT IS FURTHER ORDERED that Citation No. 20053, 6/19/78, 30 CFR 75.302-1 be, and hereby is VACATED and that the petition for assessment of civil penalty be, and hereby is, DISMISSED as relates to such citation.

John F. Cook
Administrative Law Judge

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Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 25 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner
v.

HARMAN MINING CORPORATION,
Respondent

Civil Penalty Proceeding

Docket No. NORT 79-63-P
A/O No. 44-03614-03003

No. 5-B Mine

DECISION

Appearances: Inga A. Watkins, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Robert M. Richardson, Esq., Richardson, Kemper, Hancock & Davis, Bluefield, West Virginia, for Respondent.

Before: Judge Cook

I. Procedural Background

On January 31, 1979, the Mine Safety and Health Administration (Petitioner) filed a petition for assessment of civil penalty against Harman Mining Corporation (Respondent) in the above-captioned proceeding. The petition was filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1978) (1977 Mine Act), and alleged violations of two provisions of the Code of Federal Regulations. The Respondent filed its answer on March 5, 1979.

Pursuant to notices, the hearing was held on July 17, 1979, in Beckley, West Virginia. Representatives of both parties were present and participated. Counsel for the Petitioner made two motions during the course of the hearing: First, to dismiss the petition for assessment of civil penalty as relates to Citation No. 321765, August 10, 1978, 30 CFR 75.523 (Tr. 4); second, to amend the petition for assessment of civil penalty as relates to Citation No. 321763, issued on August 10, 1978, to allege that the condition described therein constitutes a violation of both 30 CFR 75.523 and 30 CFR 75.523-1 (Tr. 67). Both motions were granted (Tr. 4, 71).

A schedule for the submission of posthearing briefs was agreed upon after the presentation of the evidence. However, subsequent events necessitated a revision thereof. The Petitioner and the Respondent filed posthearing briefs on November 14, 1979, and November 29, 1979, respectively. Neither party filed a reply brief.

II. Violations Charged

Citation No.	Date	30 CFR Standard
321763	8/10/78	75.523 75.523-1
321765	8/10/78	75.523 [1]

III. Evidence Contained in the Record

A. Stipulations

The stipulations entered into by the parties are set forth in the findings of fact, infra.

B. Witnesses

The Petitioner called as its witness James O. Vandyke, a Mine Safety and Health Administration (MSHA) inspector.

The Respondent called as its witnesses Eugene Carter, a repairman and mechanical leader employed by the Respondent; and Paul Hurley, the Respondent's vice president of operations.

C. Exhibits

1. The Petitioner introduced the following exhibits into evidence:

(a) M-1 is a copy of Citation No. 321763, August 10, 1978, 30 CFR 75.523.

(b) M-2 is a copy of the inspector's statement pertaining to M-1.

(c) M-3 contains notes made by Inspector Vandyke.

(d) M-4 is a computer printout compiled by the Directorate of Assessments listing the history of violations for which the Respondent had paid assessments beginning August 10, 1976, and ending August 10, 1978.

2. The Respondent did not introduce any exhibits into evidence.

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of 1977 Mine the Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

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[1] As noted previously, the petition for assessment of civil penalty was dismissed as relates to this citation.

V. Opinion and Findings of Fact

A. Stipulations

1. Harman Mining Corporation is a large operator, mining over 500,000 tons of coal per year and employing approximately 300 employees (Tr. 4).

2. The proposed penalty would not affect the operator's ability to continue in business (Tr. 4).

B. Occurrence of Violation

MSHA inspector James O. Vandyke visited the Respondent's No. 5-B Mine at approximately 9 a.m., August 10, 1978, to make a complete health and safety inspection (Tr. 16). He was accompanied on the inspection tour by Mr. Roy Owens, an employee of the Respondent (Tr. 16, 18; Exh. M-1).

The inspector observed a canopy-equipped coal drill operating in the face area of the No. 2 entry of the 001 section (Tr. 18, 100, Exh. M-1). At the inspector's request, the coal drill operator tested the machine's deenergizing device at which time the inspector observed that the device would not deenergize the machine (Tr. 18). A close examination revealed the presence of a wooden cap wedge driven behind the device, propping it open (Tr. 18, 73). The inspector testified that absent the wedge it would have been possible to cut the machine's electrical power by depressing the deenergizing device (Tr. 73). Accordingly, the inspector issued the subject citation alleging that "[t]he device being used to deenergize the coal drill on the 001 section quickly in the event of an emergency was inoperative" (Exh. M-1). The petition for assessment of civil penalty, as amended, alleges that the condition sets forth a violation of 30 CFR 75.523 and 30 CFR 75.523-1. The latter regulation will be addressed first, and provides, in part, as follows:

> (a) Except as provided in paragraphs (b) and (c) of this section, all self-propelled electric face equipment which is used in the active workings of each underground coal mine on and after March 1, 1973, shall, in accordance with the schedule of time specified in paragraphs (a)(1) and (2) of this section, be provided with a device that will quickly deenergize the tramming motors of the equipment in the event of an emergency. The requirements of this paragraph (a) shall be met as follows:

> (1) On and after December 15, 1974, for self-propelled cutting machines, shuttle cars, battery-powered machines, and roof drills and bolters;
>
> (2) On and after February 15, 1975, for all other types of self-propelled electric face equipment. [2/]

The coal drill was trammed by two hydraulic tramming motors. A pump turned by an electric motor provided the hydraulic pressure necessary to operate the tramming motors. It pumped hydraulic fluid at the rate of approximately 15 to 18 gallons per minute at a pressure of 1,200 to 1,400 pounds. After leaving the pump, the pressurized hydraulic fluid was transmitted to a control box, or valve bank, and, in turn to the hyraulic motors (Tr. 73-74, 129, 139-141). All hydraulic levers, including those used to operate the tramming motors, were self-centering (Tr. 130), meaning that the levers automatically returned to a neutral position when released by the machine operator (Tr. 28, 112-113, 130). Releasing the tramming motor levers would stop the flow of hydraulic fluid to the tramming motors and thus stop the movement of the machine, assuming the levers self-centered (Tr. 29-30, 37, 75-76). Machine movement would be arrested almost instantaneously (Tr. 112, 132). However, the electrically-powered pump would still be in operation, providing pressure to the valve bank (Tr. 81). The lever could then accidentally be pushed again starting movement of the drill.

The Respondent sets forth essentially two arguments germane to the question of whether a violation of 30 CFR 75.523-1 occurred: First, the regulation applies solely to electrical tramming motors and has no application to hydraulic tramming motors. Second, the coal drill was equipped with a device that would quickly deenergize the tramming motors in the event of

---

2/ The exceptions set forth at 30 CFR 75.523-1(b) and (c) provide as follows:

"(b) Self-propelled electric face equipment that is equipped with a substantially constructed cab which meets the requirements of this part, shall not be required to be provided with a device that will quickly deenergize the tramming motors of the equipment in the event of an emergency.

"(c) An operator may apply to the Assistant Administrator-Technical Support, Mine Safety and Health Administration, Department of Labor, 4015 Wilson Boulevard, Arlington, Va. 222203 for approval of the installation of devices to be used in lieu of devices that will quickly deenergize the tramming motors of self-propelled electric face equipment in the event of an emergency. The Assistant Administrator-Technical Support may approve such devices if he determines that the performance thereof will be no less effective than the performance requirements specified in § 75.523-2."

The coal drill in question was canopy-equipped and thus not within the 30 CFR 75.523-1(b) exception to the general requirement. The Respondent presented no evidence establishing the applicability of 30 CFR 75.523-1(c).

an emergency as required by 30 CFR 75.523-1. (Respondent's Posthearing Brief, pp. 5-6). I disagree with both arguments. The purported distinction between electrical tramming motors and hydraulic tramming motors is superficial in view of the presence of the electrically-powered pump on the hydraulic system. This electric motor was the primary source of power for the hydraulic system. Any deenergizing device meeting 30 CFR 75.523-1(a)'s requirement for "a device that will quickly deenergize the tramming motors of the [self-propelled electric face equipment which is used in the active workings] in the event of an emergency" must, of necessity, deenergize the electric pump motor.

Additionally, 30 CFR 75.523-1(a) must be read in conjunction with the requirements of 30 CFR 75.523-2(a), which provides as follows:

> (a) Deenergization of the tramming motors of self-propelled electric face equipment, required by paragraph (a) of § 75.523-1, shall be provided by:
>
> (1) Mechanical actuation of an existing pushbutton emergency stopswitch,
>
> (2) Mechanical actuation of an existing lever emergency stopswitch, or
>
> (3) The addition of a separate electromechanical switch assembly.

This regulation mandates the use of one of three types of switches in order to meet the requirements of 30 CFR 75.523-1(a). The term "switch" is defined in Paul W. Thrush (ed.), A Dictionary of Mining, Mineral, and Related Terms (Washington D.C.: U.S. Department of the Interior, Bureau of Mines) (1968) at page 1111 as: "A mechanical device for opening and closing an electric circuit; a mechanism for shifting a moving body in another direction." Given the context of electric face equipment, a "switch" must be construed as referring to a mechanical device for opening and closing an electric circuit.

It is clear from the evidence contained in the record that the coal drill's self-centering hydraulic levers were not "switches" within the meaning of 30 CFR 75.523-2(a), since they did not open and close an electric circuit. It would be accurate to state that they opened and closed a hydraulic circuit, but as such were inadequate to provide complete deenergization of the tramming motors. That could only be achieved through the deenergization of the electrically-driven pump.

In addition we find that 30 CFR 75.523-2 went on to provide further performance requirements for such deenergization equipment by providing as follows in subsections (b) and (c):

> (b) The existing emergency stopswitch or additional switch assembly shall be actuated by a bar or lever which

> shall extend a sufficient distance in each direction to permit quick deenergization of the tramming motors of self-propelled electric face equipment from all locations from which the equipment can be operated.
>
> (c) Movement of not more than 2 inches of the actuating bar or lever resulting from the application of not more than 15 pounds of force upon contact with any portion of the equipment operator's body at any point along the length of the actuating bar or lever shall cause deenergization of the tramming motors of the self-propelled electric face equipment.

Such panic bar did exist on the subject equipment but a wooden wedge had been driven behind it to stop it from functioning. It is clear from 30 CFR 75.523-2 that such a panic bar is what was contemplated by the regulations in question.

In light of these considerations, it cannot be concluded that the levers were adequate to meet the requirements of 30 CFR 75.523-1(a). Accordingly, the Respondent's arguments are not persuasive on the issue of whether a violation occurred.

The presence of the wooden cap wedge is, however, determinative. I read 30 CFR 75.523-1(a) as requiring an operable emergency deenergizing device on the coal drill. Since the evidence establishes that the placement of the wedge rendered the device inoperable, it must be found that a violation of 30 CFR 75.523-1(a) has been established by a preponderance of the evidence.

In view of this finding, it is unnecessary to determine whether the above-stated facts establish a violation of 30 CFR 75.523.

C. Negligence of the Operator

Mr. Carter testified that the machine had been purchased as used mine equipment from Mercer Welding in Bluefield, West Virginia. He did not know whether the emergency deenergizing device had been installed by the original manufacturer but his testimony indicated that it had been installed prior to the purchase by the Respondent (Tr. 126).

The testimony of both Inspector Vandyke and Mr. Carter indicates that the deenergizing device had been rendered inoperative through the placement of the wooden cap wedge in order to compensate for the device's poor design and installation. This design and installation deficiency rendered it virtually impossible to operate the machine without blocking-out the deenergizing device, as attested to by the inspector's conversation with the coal drill operator:

> Q. Mr. Vandyke, were any statements made to you by the operator or any of the miners concerning this alleged violation?

> A. Well, the operator of the machine said that the device, when it was operative and not being blocked out, would, in the normal functions of the machine, in tramming the machine from one face to another, the vibrations and so on, and being that the deck was narrow, he said that he was required to lean into close proximity of the device and he said that he would bump it off several times because of the design of the working deck of the machine.

(Tr. 24).

I find this hearsay testimony entitled to great probative weight because the testimony of Mr. Carter confirms, in part, the assertions of the hearsay declarant. Mr. Carter testified that he could understand why the wedge had been used to render the deenergizing device inoperable (Tr. 120). During cross-examination, he testified as follows:

> THE WITNESS: [The deenergizing devices] are trouble. They are balanced out. A rough botton [sic] or vibration will knock them off; shut you down. I mean, you will working [sic] and all of a sudden it will de-energize the machine and it will stop. If you want to stop, turn loose your lever; it will stop.
>
> They're not supposed to do it, but sometimes the operator will -- I suppose that's the way it got there. I don't think it got there by accident; it may have.

(Tr. 119).

It can be inferred that the deficiency had existed for a considerable period of time. Corrective action should have been taken at the time of purchase or as soon as the deficiency was apparent. Given the nature of the deficiency, the Respondent should have foreseen the miners blocking out the device in order to perform their assigned mining tasks.

Additionally, the condition should have been detected during the weekly examinations of electric equipment required by 30 CFR 75.512-2.

Accordingly, I conclude that the Respondent demonstrated far more than ordinary negligence.

D. Gravity of the Violation

The No. 5-B Mine has an uneven surface with water and mud in various locations (Tr. 16, 124). The inspector testified that the machine operator requires the ability to deenergize the machine in emergency situations to prevent striking another control lever prior to regaining his composure (Tr. 20). According to Inspector Vandyke, the coal drill operator could lose control of the machine due to the uneven surface and, in a state of fright or panic, pull the wrong levers (Tr. 21). The machine could pin him against a rib, timber, or another machine (Tr. 21, 97). The uneven surface could also result in a loss of control while tramming to another working face. Pulling the wrong lever could result in injuries to other miners (Tr. 21). Additionally, the machine operator could encounter other persons or another machine while traveling through one of the fly curtains used to help ventilate the working faces (Tr. 21-22).

The inspector indicated that all miners on the section would have been exposed to the hazard, a figure placed at approximately eight men (Tr. 18, 22). However, he testified that only one person would sustain injury during a given occurrence (Tr. 22). Anticipated injuries ranged from broken bones and contusions to death (Tr. 97).

These considerations, standing alone, point to a very serious violation. However, an appropriate assessment of the gravity of the violation requires that consideration be accorded to the characteristics of the self-centering hydraulic levers bearing upon safety. Messrs. Carter and Hurley testified that the machine moved at approximately 70 to 75 feet per minute, *i.e.*, slowly (Tr. 112, 132). Releasing the levers would cause the machine to stop in less than 1 foot, depending on the conditions (Tr. 132), and also lock the wheels (Tr. 117). Thus, according to Mr. Hurley, the machine would stop quickly in the event of an emergency (Tr. 131).

It should be noted that the machine could coast for approximately 6 to 10 feet by leaving the hydraulic lever in the forward position with the pump motor deenergized (Tr. 133). However, I find it unlikely that such an event would occur in the event of an emergency if the levers self-centered properly. There was no evidence adduced establishing that they were defective in any manner. Once the lever is self-centered there is the possibility that it could be accidentally pushed forward again.

Considering all apsects, I conclude that the violation was moderately serious.

E. Good Faith in Attempting Rapid Abatement

The Respondent abated the violation in 15 minutes (Tr. 18, Exh. M-1). Accordingly, it is found that the Respondent demonstrated good faith in attempting rapid abatement.

F. History of Previous Violations

The history of previous violations at the Respondent's various mines for which the Respondent had paid assessments during the 24 months prior to August 10, 1978, is set forth as follows:

Violations of 30 CFR	Year 1 8/11/76 - 8/10/77	Year 2 8/11/77 - 8/10/78	Totals
All Sections	176	89	265
Section 75.523-1	8	2	10

G. Appropriateness of Penalty to Operator's Size

The parties stipulated that Harman Mining Corporation is a large operator, mining over 500,000 tons of coal per year and employing over 300 employees (Tr. 4).

H. Effect on Operator's Ability to Continue in Business

The parties stipulated that the proposed penalty would not affect the operator's ability to continue in business (Tr. 4). Furthermore, the Interior Board of Mine Operations Appeals has held that evidence relating to the issue as to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). Therefore, I find that penalties otherwise properly assessed in this proceeding will not impair the operator's ability to continue in business.

VI. Conclusions of Law

1. Harman Mining Corporation and its No. 5-B Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. MSHA inspector James O. Vandyke was a duly authorized representative of the Secretary of Labor on August 10, 1978.

4. The oral determination made at the hearing granting the Petitioner's motion to dismiss the petition for assessment of civil penalty as relates to Citation No. 321765, August 10, 1978, 30 CFR 75.523, is AFFIRMED.

5. The oral determination made at the hearing granting the Petitioner's motion to amend the petition for assessment of civil penalty as relates to Citation No. 321763, issued on August 10, 1978, to allege a violation of both 30 CFR 75.523 and 30 CFR 75.523-1 is AFFIRMED.

6. The condition set forth in Citation No. 321763, issued on August 10, 1978, is found to have occurred and to constitute a violation of 30 CFR 75.523-1.

7. All of the conclusions of law set forth in Part V of this decision are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

Both parties submitted posthearing briefs. Such briefs, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. Penalty Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty is warranted as follows:

Citation No.	Date	30 CFR Standard	Penalty
321763	8/10/78	75.523-1	$175

ORDER

A. The oral determination made at the hearing granting the Petitioner's motion to dismiss the petition for assessment of civil penalty as relates to Citation No. 321765, August 10, 1978, 30 CFR 75.523, is AFFIRMED.

B. The oral determination made at the hearing granting the Petitioner's motion to amend the petition for assessment of civil penalty as relates to Citation No. 321763, issued on August 10, 1978, to allege a violation of both 30 CFR 75.523 and 30 CFR 75.523-1 is AFFIRMED.

C. The Respondent is ORDERED to pay a civil penalty in the amount of $175 within 30 days from the date of this decision.

D. IT IS FURTHER ORDERED that Citation No. 321765, August 10, 1978, 30 CFR 75.523, be, and hereby is, VACATED and that the petition for assessment of civil penalty, be, and hereby is, DISMISSED as relates to said citation.

John F. Cook
Administrative Law Judge

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Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 25 1980

CLIMAX MOLYBDENUM COMPANY, A division of AMAX, Inc., Contestant	:	Contest of Citation and Order Docket No. WEST 79-92-RM
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Citation No. 334415 April 18, 1979 Order No. 33417 April 18, 1979 Climax Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
v.	:	Docket No. WEST 80-108-M A.O. No. 05-00354-05032R
CLIMAX MOLYBDENUM COMPANY, A division of AMAX, Inc., Respondent	:	Climax Mine

DECISIONS

Appearances: W. Michael Hackett, Esquire, Golden, Colorado, and Todd D. Peterson, Esquire, Crowell & Moring, Washington, D.C., for contestant-respondent Climax Molybdenum Company;
Robert A. Cohen, Attorney, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for petitioner-respondent MSHA.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a section 104(a) citation and subsequent 104(b) order issued by MSHA pursuant to the Federal Mine Safety and Health Act of 1977, charging Climax Molybdenum Company with a violation of section 103(a) of the Act for its refusal to permit MSHA inspectors to bring cameras on its mine property in the course of their inspections for the purpose of documenting violations of the Act and safety and health standards promulgated thereunder. The parties waived an evidentiary hearing, and submitted the case for decision on the record, which includes the pleadings and legal arguments presented in the proposed findings, conclusions, and supporting briefs filed by the parties.

There does not appear to be any dispute as to the facts which precipitated the controversy at issue in these proceedings. On April 18, 1979, MSHA inspectors commenced a regular safety and health inspection of the Climax Mine. The inspectors carried with them instamatic cameras with flash attachments for the purpose of recording potential violations of the Federal Mine Safety and Health Act of 1977. Climax spokesman David Helmer refused to permit the MSHA inspectors to bring the photographic equipment along on the inspection. Climax's refusal of permission was based upon a uniform company policy that prohibits non-employees from using photographic equipment on Climax property and upon Climax's belief that MSHA was not statutorily permitted to use the equipment for the purpose of documenting violations.

As a result of the refusal, inspector Richard H. White issued a section 104(a) citation, No. 334415, which alleged a violation of section 103(a) of the Act. Subsequently, Inspector White issued a section 104(b) order, No. 334417, for failure to abate the citation. Climax subsequently filed a contest under section 105 of the Act in order to challenge the citation and order, and based on a stipulation of the facts, and at the request of the parties, I cancelled the scheduled hearing and ordered the parties to file briefs.

Petitioner's pleadings filed in the civil penalty proposal (Docket No. WEST 80-108-M) states that Citation No. 334415 was issued pursuant to section 104(a) of the Act, and that the specific standard cited was "30 CFR 103(A)." A copy of the citation attached to the pleadings and proposal reflects that it was issued on April 18, 1979, at 10:03 a.m., by MSHA inspector Richard H. White, and the condition or practice alleged to be a violation is described as follows on the face of the citation: "A spokesman for the company in the pre-inspection conference would not let MSHA inspector carry cameras underground for the purpose of taking pictures of violations which were to be a citation or order."

The inspector fixed the abatement time as 10:33 a.m., April 18, 1979, and at 10:45 a.m. that same day he issued a section 104(b) order of withdrawal citing a violation of section 103(a) of the Act, and the condition or practice is again described as follows: "The spokesman for the company still will not allow MSHA inspectors to take cameras underground for the purpose of taking pictures of violations." The area required to be closed by the withdrawal order is described as "none."

In its answer filed in response to the proposal for assessment of a civil penalty for the alleged violation, Climax states that there was no violation of section 103(a) because there is no authority under the Act or its regulations for MSHA to utilize photographic equipment during the course of regular health and safety inspections. In contesting both the citation and order, Climax asserts that:

1. The provisions of § 103(a) of the Mine Act, cited by the inspector as the basis for the issuance of the citation/order, do not authorize the use of photographic equipment in underground mines during the course of regular health and safety inspections conducted by the MSHA inspectors.

2. MSHA has no specific regulatory authority which justifies the use of photographic equipment during regular health and safety inspections of underground mines.

3. The use of photographic equipment underground by MSHA inspectors may actually expose miners to unsafe conditions.

4. The use of photographic equipment on Climax company property by non-employees is in violation of Climax policy.

5. The use of photographic equipment by MSHA inspectors is in violation of the interim rules of the Commission concerning the proper manner for taking discovery in administrative litigation cases.

6. Utilization of photographic equipment by MSHA inspectors creates the potential for disclosure of information which is proprietary in nature, and thus would divest Climax of the right to have this information remain outside the domain of public knowledge.

7. The improvement of safety is not advanced by the utilization of photographic equipment during the course of MSHA regular health and safety inspections.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*.

2. Section 103(a) of the Act provides, in pertinent part:

> Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering of information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with

> any citation, order or decision issued under this title or other requirements of this Act * * *. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare shall have a right of entry to, upon, or through any coal or other mine. [Emphasis added.]

Section 103(b) states in pertinent part:

> For the purpose of making any investigation of any accident or other occurrence relating to health or safety in a coal or other mine, the Secretary may, after notice, hold public hearings, and may sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths.

Section 103(e) provides:

> Any information obtained by the Secretary or by the Secretary of Health, Education, and Welfare under this Act shall be obtained in such a manner as not to impose an unreasonable burden upon operators, especially those operating small businesses, consistent with the underlying purposes of this Act. Unnecessary duplication of effort in obtaining information shall be reduced to the maximum extent feasible.

Section 104(a) provides:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.

Issues Presented

1. Does section 103(a) of the Act grant MSHA inspectors the authority to take cameras into or onto mine property for the purpose of taking

photographs of alleged conditions or practices which they believe constitute violations of mandatory safety or health standards?

2. Can MSHA inspectors use photographic equipment during a regular health and safety inspection irrespective of formal Secretarial rulemaking authorizing the use of cameras by MSHA personnel?

3. Can a mine operator be cited under section 103(a) of the Act for refusal to permit MSHA inspectors to take photographic equipment with them underground?

Additional issues raised by the parties are discussed in the course of these decisions.

DISCUSSION

Contestant's Arguments

In support of its position, Climax asserts that since the Climax Mine is private property, and since freedom from unreasonable Government intrusion is one of the fundamental guarantees of the Constitution, in the absence of any statutory authority to the contrary, Climax may regulate the Government's entry and activity in the mine. Thus, if the Government seeks to transgress upon the established privacy rights of Climax, it must at the very least, possess some explicit statutory authority to do so. Assuming, arguendo, that there exists such statutory authority, Climax asserts that it is found in section 103(a) of the Act, and that from its point of view, the issue here is whether that section of the Act unequivocally authorizes MSHA to intrude upon Climax's privacy and property rights by taking photographs solely for use as evidence at trial in a contested proceeding.

In further support of its arguments, Climax asserts that the strictness or liberality with which the words of section 103(a) are construed must be determined by reference to the nature of that particular section as it applies to the issue in this case, and that it is well settled that a remedial statute may be broadly construed for most purposes, yet strictly construed where it is punitive or treads close to constitutionally-protected areas. 3 C. Sands, Sutherland Statutory Construction, §§ 58.03, 60.04 (1973). Even though the substantive provisions of the Act, as remedial legislation, may be construed liberally, Climax argues that the proper focus in the context of the present case is not upon the nature of the Act as a whole, but rather on the specific statutory provision at issue, as it impacts upon the parties in this case. Thus, the effect of section 103(a) alone must determine the nature of the construction given that provision. Foremost among the factors justifying a strict construction of section 103(a), argues Climax, is the danger that MSHA's use of photographic equipment, particularly in the context of a warrantless inspection, would further encroach upon Climax's constitutionally-protected right of privacy. The fourth amendment guarantees of freedom from unreasonable searches applies to

Climax as it does to any homeowner, and the Supreme Court has consistently refused to uphold otherwise unreasonable searches simply because commercial establishments were the subject of the search. Go-Bart Importing Company v. United States, 282 U.S. 344 (1931); Amos v. United States, 255 U.S. 313 (1921); Silverthrone Lumber Company v. United States, 251 U.S. 385 (1920). "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." See v. City of Seattle, 387 U.S. 541, 543 (1967), accord, Marshall v. Barlow's, Inc., 436 U.S. 307, 311-12 (1978).

Climax argues that the Supreme Court has specifically emphasized that fourth amendment rights must be protected by limitations on the right of the Government to invade premises during an administrative search. Camara v. Municipal Court, 387 U.S. 5223 (1967); See v. City of Seattle, supra; Marshall v. Barlow's, Inc., supra. Since MSHA inspections may result in criminal as well as civil liability (see, e.g., section 110(d) of the Act), Climax asserts that the full range of constitutionally-based self-protection, as well as privacy guarantees, shield the Climax Mine from unreasonable Government intrusion, Camara v. Municipal Court, supra, 387 U.S. at 520, and that "[i]f the government intrudes upon a person's property, the privacy interest suffers whether the government's motiviation [sic] is to investigate violations of criminal laws or breaches of other statutory or regulatory standards," Marshall v. Barlow's, Inc., supra, 436 U.S. at 312-13.

Climax suggests that the danger of unreasonable Government interference is even greater in the case of a warrantless search, and even assuming that the warrantless search of its mine did not run afoul of the fourth amendment, the warrantless nature of the search created greater dangers for invasion of Climax's constitutionally-protected privacy, and in such a setting, the Supreme Court has always strictly limited the scope of permissible warrantless searches, citing Michigan v. Tyler, 436 U.S. 499 (1978), a case in which fire officials had made repeated warrantless entries of a building in order to search for evidence of arson. The Court held that fire officials needed no warrant to enter a burning building because entry to extinguish a fire was "reasonable." The Court further held that once in the building, the fire fighters could remain for a reasonable time to take only evidence in plain view and to investigate the cause of the fire. After the initial exigency, however, any further reentry to investigate required either a warrant or the consent of the property owner. Thus, Climax asserts that the scope of a permissible warrantless search is restricted by the fourth amendment privacy rights of the property owner, and even where a warrantless search is permitted, the scope of the authorized search is exceedingly narrow; citing Chimel v. California, 395 U.S. 752 (1969) (searches incident to arrest); Terry v. Ohio, 392 U.S. 1 (1968) (pat-downs for weapons); and even where the courts have upheld the right of MSHA to conduct warrantless searches, they have recognized that the searches must be limited in scope, Marshall v. Nolichuckey Sand Corporation, 606 F.2d 693 (6th Cir. 1979).

Climax asserts that to grant the inspector wide latitude to engage in activities not expressly authorized would result in an unwarranted and unreasonable intrusion upon Climax's constitutionally-shielded right of privacy, and that the problem is exacerbated in the case of photographs for a number of reasons. Photographs have the great potential of revealing trade secrets or other proprietary information, and MSHA could unwittingly reveal sensitive information about Climax's production or mining practices. The creation of a permanent pictorial record of Climax's private mining facilities thus compounds the invasion of privacy severalfold; it opens up Climax property not only to the inspector, but effectively to all who might see the photographs. This multiplier effect therefore enhances Climax's need for protection and justifies a close reading of MSHA's statutory powers on this specific issue.

Climax argues further that the impact on its privacy and proprietary operations is further increased by the fact that the use of photographic equipment and its accompanying flash attachments could distract miners whose attention must be focused entirely on the safe operation of massive machinery in confined underground spaces. The mere presence of Government inspectors is distracting enough to Climax's miners; taking pictures with a flash has much greater potential for disrupting normal operations and diminishing safety during the mining process. This factor simply reinforces Climax's protected privacy interest in avoiding added MSHA intrusion into its property.

Finally, Climax asserts that strict construction is even more appropriate where there is no explicit regulation or formal MSHA action authorizing the use of photographic equipment, and points to the fact that by contrast, OSHA inspectors are specifically authorized by regulation to take photographs during the course of an inspection, 29 CFR 1903.7(b), and which may be used in a subsequent enforcement hearing. MSHA, however, has no comparable regulation; in fact, there appears to be no official MSHA authorization at all for the attempted use of photographic equipment by Inspector White. In the absence of a formal authorizing regulation, MSHA inspection practices ought to be strictly limited. Since MSHA has not officially sanctioned the use of photographic equipment, the informal practices of individual inspectors or district managers are not entitled to great deference. Particularly in an area where privacy rights are implicated, the scope of an inspector's informal power, unauthorized by specific regulation, ought to be carefully circumscribed.

In addition to its fourth amendment arguments, Climax asserts that section 103(a) of the Act contains no explicit authorization to take photographs, and that any such authority must be inferred from the general inspection power. The photographs, and the use to which they are put, must achieve in some direct and concrete manner one of the four statutorily-prescribed purposes for MSHA inspections. If the photographs are not reasonably calculated to achieve one of the four-stated purposes, then their use is not authorized by the statute.

Climax asserts that the purpose for which MSHA intends to use photographs taken in the course of an inspection was made clear in a recent case involving the same parties, Climax Molybdenum v. MSHA, DENV 78-581-M (Judge Cook; hearing date, January 31, 1979), where MSHA inspector James Enderby testified as follows:

> Well, since our first meeting here in November, the District Manager has issued cameras as inspection equipment to every inspector in the district. We are instructed as a policy from now on, from that point forward, if we think we are going to have a citation that we write or whatever, that could come into litigation, to take a picture of that particular violation.
>
> * * * * * * *
>
> Now, anytime we write a violation that we think will be, or has a possible chance of being litigated, to take a picture of it in all the surrounding circumstances.

Climax argues that this testimony makes it clear that MSHA inspectors in this district are attempting to use photographic equipment in preparation for potential litigation, and that the sole conceivable justification is to develop evidence for use at trial. In these circumstances, Climax believes that the inspector ceases to be an enforcement officer of MSHA and instead becomes an agent of the Solicitor to aid the lawyer in preparing his case, and in this context his inspection is not for violations, but a form of extrajudicial pretrial discovery. In support of its arguments, Climax asserts that the taking of photographs to be used as evidence in a later hearing does not further any of the statutorily-enumerated purposes of section 103(a) and therefore is not authorized by the Act. The first two purposes clearly do not apply to the present situation. The use of photographs as evidence in a hearing does not involve "obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines." This section is aimed at the generation of publicity and public information relating to mine safety and health, not to the development of evidence for use in a hearing. Thus, while it might authorize the taking of photographs for the purpose of studying some specific condition or disseminating information to the public, it does not justify the use of photographic equipment for the purpose of corroborating an inspector's testimony at a hearing.

The second statutory purpose, "gathering information with respect to mandatory health or safety standards," grants power to conduct research in order to develop effective regulations for the protection of safety and health. It does not contemplate use in an enforcement proceeding of the information gathered pursuant to its provisions. Thus, it cannot authorize the taking of photographs for use as evidence in an enforcement hearing.

The third and fourth purposes authorize inspections only for "determining whether an imminent danger exists" and "determining whether there is compliance with the mandatory health and safety standards * * *." Simply stated, this section authorizes an inspector to travel the mine to assure himself that no imminent dangers exist and that the operator is complying with the mandatory standards. It does not authorize an inspector to do whatever is helpful to the Solicitor's Office for the purpose of persuading an administrative law judge that a violation existed when the inspector visited the mine.

Photographs for use in a hearing are not taken to help the inspector to determine whether a violation or imminent danger exists; rather, the photographs are used later to support the Solicitor's case that a violation did exist. Thus, the taking of photographs is distinguishable from the taking of air samples, measurements, or other physical evidence where the evidence is used by the inspector to determine whether a standard has been violated rather than as corroboration of the inspector's judgment that a violation existed. The section does not authorize unlimited sleuthing solely for the purpose of preparation for trial. The development of trial evidence is more properly within the scope of prehearing discovery and is therefore outside the ambit of the explicit authority granted by section 103(a).

Climax asserts that when Congress intended MSHA to have evidence-gathering capabilities similar to pretrial discovery, it explicitly granted such authority in very limited instances. Pursuant to section 103(b) of the Act, MSHA is empowered to take testimony and compel production of documents in the course of an investigation, but no such powers are authorized for use during an inspection. Thus, although the Solicitor could take depositions and compel production of documents in preparation for a hearing on a challenged citation, MSHA inspectors are not authorized to gather such evidence during the course of an inspection. This provision confirms the division between those activities that are required in order to enable an inspector to determine the existence of a violation and those activities that are solely for the purpose of gathering evidence for trial. Citing the legislative history of both the 1969 and 1977 Acts, Climax asserts that nowhere is there any indication that Congress authorized inspectors to gather, in the course of a warrantless inspection, evidence to be used at a later trial, and the only authority granted is the power to determine whether the inspector believes there is a violation of the Act.

Finally, Climax argues that any statutory authority granted by section 103(a), must be strictly construed in light of the important privacy rights at stake, and it does not include the power to take photographs solely for the use as evidence at trial. Such evidence is not necessary to make a determination that a violation exists, rather, it is more appropriately considered a part of pretrial discovery that is best carried out under some form of judicial supervision, as for example, Commission Procedural Rule 57, 29 CFR 2700.57, which specifically provides that good cause must be shown to obtain an order to permit, inter alia, "photographing of designated documents or objects, or to permit a party or his agent to enter upon designated land to inspect and gather information."

MSHA's Arguments

MSHA argues that section 103(a) of the Act authorizes frequent mine inspections for the purpose of obtaining information concerning compliance with mandatory health or safety standards, and that section 103(e) mandates that this be done in such a manner as to not impose unreasonable burdens upon mine operators. MSHA points out that the basic method utilized by an inspector to determine compliance is by visual observations of mine conditions and practices. However, since there are many occasions when an inspector is required to use certain types of equipment or testing devices to determine if an operator is in compliance, the equipment could include methane detectors, respirable dust-sampling equipment, and smoke tubes. Here, the MSHA inspector sought to bring a camera with him as part of his regular equipment in order to better establish the existence of certain conditions, and any photograph taken would have been a part of the regular inspection process. Since there is little doubt that an inspector has the right to take and remove from a mine air and dust samples, MSHA asserts that the use of a camera to take photographs to support his belief that a violation has occurred is also appropriate, and in fact, necessary to adequately perform his duties.

In support of its position, MSHA argues that inherent in the inspector's duty to gather information under the Act is the right to preserve that information in a form in which it can be used at a later time if the inspector's enforcement actions are contested. Since the Act sets forth a procedure for contesting MSHA's enforcement actions, an inspector should be allowed to support his findings by any means which are consistent with section 103(a). While inspectors' notes and drawings of conditions observed are helpful, photographs taken at the time violations are cited can be especially useful in documenting findings that have previously been made, and the use of cameras by MSHA personnel to support enforcement actions will be helpful in resolving credibility questions which arise when citations are contested by mine operators.

MSHA asserts further that the Act requires all underground mines to be inspected at least four times a year, and because of the limited number of inspectors available to carry out the mandate of the Act, an inspector may be in an area of a mine where he is required to take some enforcement action for only a short period of time. If a particular enforcement action is contested by an operator, an inspector may not have the opportunity to revisit the mine prior to a hearing before an administrative law judge. Any hearing of a contested violation may take place many months after the initial enforcement action was taken by the MSHA inspector. All of these factors may result in the testimony of MSHA inspectors being found too vague when it comes to describing the conditions they actually observed prior to issuing a citation or withdrawal order. Operators who are seeking to contest MSHA enforcement actions may have similar problems when presenting evidence to support their position. Mine management personnel who appear at hearings frequently base their testimony concerning contested conditions on hearsay statements of other employees who are not available for cross-examination. This type of testimony can result in difficult credibility problems which must be resolved by an administrative law judge before he can determine if a violation of the Act has occurred.

MSHA takes the position that the use of photographs would serve to reduce the amount of time spent by its inspectors, as well as mine operators, in exploring the circumstances under which a violation has occurred. MSHA states that many times a judge is not fully apprised of the severity of a violation because of the inability of an inspector to accurately describe all of the conditions which lead to the issuance of his enforcement action. However, since courts have generally upheld the use and admission of photographs to give the trier of facts a better understanding of conditions at the scene of an accident, Louisville & N.R. Company v. Brown, 127 Ky. 732, 746, 196 S.W. 795, 798 (Ky. 1908), MSHA asserts that the same rationale which makes the use of photographs admissible in accident cases in supporting the testimony of witnesses is directly applicable to their use by MSHA inspectors to support their judgments that a violation of the Act has occurred. Under certain circumstances, the use of photographs will be able to convey to an inspector's supervisor, an assessment officer, or to an administrative law judge, a better impression as to whether or not a violation of the Act has occurred than could the inspector's verbal description of the conditions he observed. Of course, said photographs must usually be taken at the time the violation is observed. Recognizing the fact that before a photograph can be introduced at a hearing, it has to be authenticated that the photograph is substantially accurate and purports to represent accurately the condition or practice that it is seeking to portray, MSHA emphasizes that a photograph will not itself establish a violation of the Act, but will merely be used to support an inspector's testimony in those situations where conflicts in testimony arise. Any photograph which is not material to the condition or practice sought to be established by the inspector will be subject to objection for reasons of relevancy and materiality.

With regard to Climax's contention that the Secretary has not formally conducted any rulemaking with respect to the use of cameras as part of MSHA's enforcement scheme, similar to the OSHA regulation cited by Climax, MSHA asserts that Climax ignores the fact that administrative agencies are not required to resort to formal rulemaking in order to develop all policies and procedures necessary to aid in the enforcement process, and cites Human Resources Management, Inc. v. Weaver, 442 F. Supp. 241, 251 (1978), and the Supreme Court's holding that: "Absent constitutional constraints or extremely compelling circumstances administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties. Vermont Yankee Nuclear Power Corp. v. NRDC, 55 L.Ed 2nd 460, 479 (1978)."

In further support of its position, MSHA states that it is clear that the Act authorizes a mine entry by its inspectors to observe conditions in the mine, and that the use of a camera to preserve those conditions underground is a natural extension of the right of entry since a photograph is a mere picture of those conditions already observed, and the act of taking a photograph cannot support a claim for invasion of privacy. MSHA further believes that when an inspector uses a camera to support his judgments made with respect to the enforcement provisions of the Act, he is engaging in an efficient recognized method of inquiry. No individual rights of mine operators are affected, nor is the authorizing of the use of cameras by MSHA inspectors as part of their equipment, a substantive rule or policy that relates to the public and therefore must be published in the Federal Register. Therefore, no new rulemaking is necessary.

MSHA has submitted a copy of an April 30, 1979, policy memorandum from its Metal and Nonmetal Mine Safety and Health Administrator addressed to its Metal and Nonmetal Mine Safety and Health District Managers, regarding the use of cameras by inspectors during mine inspections. That memorandum states as follows:

> Pursuant to section 103(a) of the Mine Act, inspectors make frequent inspections of mines for purposes of (1) obtaining information relating to health and safety conditions, and the causes of accidents, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or other requirements of the Mine Act. Inasmuch as the Mine Act establishes the purposes of inspections, it follows that an inspector may take into the mine the equipment necessary to accomplish his mission.
>
> This equipment could include, in appropriate circumstances, methane detectors, torque wrenches, additional lights, and a camera. Hence, if an inspector, in his judgment, needs a particular piece of equipment to accomplish his statutory mission, the Mine Act implicitly authorizes him to use such equipment.
>
> Frequently, inspectors feel that taking photographs of the scene of an alleged violation, imminent danger or accident would be of great assistance in verifying and correcting the conditons or practices resulting in the violation, danger, or accident. The use of cameras may also be of great assistance in subsequently resolving differences of opinion between the mine operator and the inspectors as to the conditions present at the time of citation. Such photographs could also be of benefit to both parties by expediting assessment and review proceedings by providing a pictorial illustration of the scene of a violation. Accordingly, when the use of a camera would be necessary or helpful in an inspection, the District Manager or Subdistrict Manager may authorize such use during inspections of metal and nonmetallic mines subject to the following special restrictions:

1. All non-gassy metal and nonmetallic mines - none.

2. All gassy metal and nonmetallic mines - tests for methane will be performed prior to any use of a camera. If methane is present at levels in excess of 1%, or if the inspector has reason to believe methane is present, only photographic equiment approved for use in gassy mines by Approval and Certification Center shall be used.

3. All gilsonite mines - prohibited.

> Because questions have arisen in the past regarding the use of cameras, I am initially requiring District Manager's or Subdistrict Manager's approval of the use of cameras in each instance. I want you and the Subdistrict Managers to exercise discretion in the approval of the use of cameras.
>
> You should also be sure the inspectors are instructed in the use of cameras. The inspectors should make a record of the physical conditions under which the photographs are taken and the date and time and place.
>
> A refusal to permit the inspector to carry a camera into the mine will be considered a violation of section 103(a) of the Act and could also be considered an interference or hindrance of the inspector in carrying out the provisions of the Act. If there is a refusal of permission to take a camera into the mine, the inspection should nevertheless be completed and a record made of any special reasons for taking the camera into the mine.
>
> The Solicitor's Office has reviewed this memorandum and concurs with the position taken.

In view of the policy memorandum regarding the use of cameras, MSHA maintains that since it restricts the use of cameras in certain gassy mines and in all gilsonite mines, the safety problems resulting from their use in underground mines have been minimized and that unless Climax can demonstrate that there are important overriding circumstances why MSHA's use of cameras in specific situations should not be permitted underground, inspectors should be free to perform their duties using the best investigative tools available.

With respect to the alleged violation of section 103(a) for Climax's refusal to permit the use of cameras on its mine property, MSHA argues that section 104(a) authorizes the issuance of a citation or withdrawal order for violations of the Act as well as any mandatory safety or health standards. MSHA believes that the refusal of Climax to allow an inspector to carry a camera underground during an inspection amounts to hindering and impairment by an operator of MSHA's ability to carry out its duties specified under section 103 of the Act, and Climax should not be allowed to dictate to an inspector the type of equipment which he may use underground. The gathering of information to determine compliance with the requirements of the Act must proceed in an atmosphere free from attempts to intimidate or limit the activities of the inspector during the course of his duties, and given the remedial nature of the Act, an inspector must be allowed broad latitude and discretion in carrying out his duties, St. Mary's Sewer Pipe Company v. Director of the United States Bureau of Mines, 262 F.2d 378, 381 (3d. Cir. 1959); Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, 504 F.2d 741, 744 (7th Cir. 1974). Should Climax claim that the use of an individual photograph by MSHA violates a company trade secret or some other rights, it would be free to challenge the use of that particular photograph. However, that potential challenge by Climax should not be persuasive in supporting a general refusal to permit the use of cameras in underground mines. Thus, anytime an operator prevents an inspector from carrying out his investigatory functions, he violates the provisions of section 103 and can be cited accordingly.

Reply Brief Arguments

Contestant

In its reply brief, Climax views the issue in this case to be the narrow question of whether MSHA is statutorily authorized to take photographs during a warrantless inspection solely for use as evidence in an enforcement hearing. Climax does not view the issue to include whether MSHA may ever use photographic equipment; nor does it believe that the case calls for a determination as to whether photographs may be used as evidence in an enforcement hearing. Climax's position is that the taking of photographs for use in a hearing is explicitly contemplated by the Commission's Rules of Procedure, 29 CFR 2700.57, but the photographs must be taken as part of the judicially-supervised pretrial discovery process. Climax makes no objection to the gathering of evidence in this specifically-authorized and well-regulated manner. Climax does, however, object to the gathering of photographic evidence under the pretense of an inspector's determination whether to issue a citation. This form of extra-judicial discovery infringes upon Climax's privacy rights and is unauthorized by the Act. Regarding MSHA's reliance on section 103(a), Climax asserts that this section is not relevant because the conference report demonstrates that it deals only with recordkeeping requirements, S. Rep. No. 461, 95th Cong., 1st Sess. 45 (1977).

Climax reiterates its strict construction arguments, and conceding the fact that substantive provisions of the act should be liberally construed in order to effectuate the remedial purposes of the Act, it maintains that the warrantless inspection provision should be strictly construed to avoid conflict with Climax's constitutionally-protected right of privacy, and it distinguishes the cases of St. Mary's Sewer Pipe Company v. Director of the United States Bureau of Mines, 262 F.2d 378 (3d. Cir. 1959), and Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, 504 F.2d 741

(7th Cir. 1974), relied on by MSHA for its liberal construction arguments. Climax points out that these cases dealt with substantive provisions directly related to safety precautions that are readily distinguishable from the provisions of the Act in issue in the instant proceedings. Since the inspection provisions of section 103(a) authorize warrantless entry and impinge directly on Climax's constitutionally-protected right of privacy, Climax asserts that the effect of this particular provision, not the Act as a whole, is the key to the type of construction that should be applied in this case. The extent to which MSHA may invade Climax's protected privacy rights must be construed strictly in order to avoid any unnecessary infringement of Climax's privacy rights. Climax points out that MSHA's policy memorandum was issued after the citations in these proceedings were issued, and that contrary to MSHA's arguments, there is no suggestion in these proceedings that MSHA inspectors were intimidated in any way. Climax officials simply requested that they not use photographic equipment in what Climax believed to be an unauthorized manner. Further, Climax asserts that MSHA assumes that the burden is on Climax to demonstrate "over-riding circumstances" in order to prevent the use of photographic equipment, and that implicit throughout MAHA's arguments is the assumption that an inspector can enter a mine and do whatever he pleases, regardless of whether there is specific statutory authorization for his actions.

Climax believes that the MSHA approach is best illustrated in its analysis of the statutory foundation of an inspector's right to take photographs. Commenting on MSHA's argument that the use of a camera during an inspection "is a natural extension of the right of entry," Climax agrees that the use of cameras to develop evidence for trial extends the right of entry, but it is an extension that is unjustified by the specific language of section 103(a). In fact, states Climax, MSHA makes no effort to cite specific statutory language in support of its position; its arguments are all based on general assertions as to what is helpful or convenient for MSHA, and the essence of its argument is that inspectors may develop photographic evidence for trial during the course of a regular inspection in that it would be helpful to MSHA to have pictures to introduce at a hearing, and the regular inspection is the most convenient time to take the photographs. Even if the above were true, maintains Climax, it would not mean that MSHA is statutorily authorized to obtain photographic evidence at the time of an inspection. First, the fact that photographs may, in general, be useful does not mean that photographs are statutorily authorized. The whole point of the fourth amendent is to prevent the Government from taking actions that would be useful in the Government's enforcement efforts, but would infringe upon a citizen's protected right of privacy.

In this case, the general usefulness of photographs at trial does not indicate that they may be taken as part of an inspection, and in fact, Climax believes the Act authorizes an inspector only to do that which is necessary in order to determine whether to issue a citation. Photographs are not required in order to make that determination, and their use may be distinguished from methane detectors, smoke tubes, and dust sampling devices. Moreover, even assuming that photographs would be helpful at a hearing, the

Act does not authorize the extra-judicial gathering of such evidence in the course of a warrantless inspection. The inspector's statutorily-prescribed role is to determine whether a violation exists; photographs do not further that goal. If the Solicitor desires to obtain photographic evidence for a hearing, he should follow the explicit Commission procedures that have been established for that type of pretrial discovery. See 29 CFR 2700.57.

MSHA

Addressing contestant's warrantless search arguments, MSHA cites two recent U.S. Circuit Court decisions concluding that MSHA's warrantless inspections and enforcement procedures are reasonable with respect to gaining access to the nation's mines, Marshall v. Nolichuckey Sand Company, Inc., 606 F.2d 693 (6th Cir. 1979), and Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589 (3rd Cir. 1979), cert. denied, No. 79-614 (January 7, 1980). MSHA takes the position that once it has been determined that a Federal inspector has a lawful right to gain access to a mine without a warrant, the warrantless search and right of privacy issues become moot. MSHA asserts that the real issue in this case concerns the investigatory methods an inspector may use to preserve evidence and document his findings, after he has gained access to the premises. Since mining has been a heavily-regulated industry for a number of years, MSHA argues that Congress intended that MSHA's right to make warrantless searches be interpreted broadly, and cites the following excerpt from the legislative history:

> Safety conditions in the mining industry have been pervasively regulated by Federal and state law. The Committee intends to grant a broad right-of-entry to the Secretaries or their authorized representatives to make inspections and investigations of all mines under the Act without first obtaining a warrant. S. R. No. 95-181, 95th Cong., 1st Session, p. 27

In further support of its arguments, MSHA asserts that its broad right-of-entry not only applies to the actual entry itself, but also to what an MSHA inspector may do during the course of his inspection. The fact that he gains access to a mine without a warrant does not in any way limit or restrict his investigatory duties under the Act, and the use of a camera to preserve evidence and to document his findings are clearly reasonable and important parts of his investigatory functions. The actual taking of a photograph does not enlarge MSHA's original right-of-entry, since an inspector already has the right to visually observe all conditions in a mine which a photograph could depict.

In response to Climax's privacy arguments, MSHA points out that inspectors are at the Climax Mine on almost a daily basis, and citing United States v. Biswell, 406 U.S. 311 (1972), argues that the court there held that owners of highly-regulated industries have little expectation of privacy since Federal regulation of these industries serves an important Governmental interest. Since a photograph merely preserves a visual picture of what an inspector has already observed, MSHA suggests that no privacy rights of Climax are affected.

Regarding Climax's characterization of an inspector as an "agent" of the Solicitor's Office, MSHA states that this is absurd since the same argument could be made about an inspector who takes good notes or makes detailed drawings of conditions he observes in a mine. Moreover, the Solicitor's Office only becomes involved in a small percentage of the total enforcement actions taken by MSHA. It is clear that photographs can serve many important functions in assisting MSHA in carrying out the Congressional mandate, aside from litigation preparation; and photographs are frequently used in resolving credibility problems and therefore may actually serve to eliminate the need for litigation in a particular situation. MSHA concludes that Climax's reliance on a narrow interpretation of MSHA's right-of-access to its mine should be rejected.

Findings and Conclusions

Warrantless Searches

The authority of Government officials to conduct inspections for law enforcement purposes is limited by the fourth amendment to the Constitution which proscribes unreasonable searches and seizures. As a general rule, to conduct a search, a law enforcement official must first obtain a warrant based on probable cause, *See* v. *City of Seattle*, 387 U.S. 541 (1967). Where authorized by Congress, however, warrantless searches without probable cause may be conducted for legitimate regulatory purposes, *United States* v. *Biswell*, 406 U.S. 311 (1972). Although the courts in the past have deferred to the discretion of the legislature in granting administrative investigative powers, recent decisions indicate that the courts may not be hesitant to prevent the abuse of these powers or to discharge their role as protectors of individual rights.

Two cases decided by the Supreme Court in 1967 dealt with the administrative searches by *non-federal* Government officials, and both found administrative searches sufficiently significant intrusions to require prior judicial authorization. In *Camara* v. *Municipal Court*, 387 U.S. 523 (1967), a case cited by Climax, a public health inspector sought to make a routine annual inspection of appellant's premises for possible violations of a local housing code. Without requiring that a search warrant be obtained, a local municipal ordinance provided that inspectors should have the right to enter at reasonable times to permit such inspections, and refusal to permit entry was subject to a fine and jail sentence. Upon refusal by the appellant to permit a warrantless inspection of his premises, he was arrested and charged with a violation of the local ordinance. Noting that even a law-abiding citizen has a strong interest in preserving the sanctity of his home from official intrusion, the Court rejected the notion that the fourth amendment interests at stake in inspection cases are merely "peripheral" and held that the constitutional guarantee applies with full force to such searches, and further found administrative searches sufficiently significant to require prior judicial authorization.

In See v. Seattle, supra, a municipal ordinance authorized compulsory warrantless inspections of certain buildings, except the interior of dwellings, as often as necessary to discover violations of the city's fire code. The Court ruled that there is no justification for relaxing fourth amendment safeguards simply because the inspection is of commercial premises, since a businessman's constitutional right to be free from unrestricted official entries is of no less significance than that of a private resident. The Court applied the warrant procedure outlined in Camara to commercial inspections, and while noting that each demand for entry should be measured against a flexible standard for reasonableness, noted that "the decision to enter and inspect should not be the product of unreviewed discretion of the enforcement officer in the field." 387 U.S. at 544-45.

Although Camara and See involved local municipal administrative searches and may arguably be distinguishable from Federal administrative agencies on the basis of the subject matter regulated, it would seem that for the most part, the interests generally advanced for Federal agency searches are no more compelling than those at issue in the cases concerning local, state, and municipal agencies. As a matter of fact, as pointed out by Climax in the cases footnoted at page 7 of its initial brief, the issue of warrantless searches, insofar as it may affect Climax's constitutionally-protected right of privacy, is not free of doubt, particularly in the context of the metal and nonmetal mining industry.

The issue of warrantless searches pursuant to section 103(a) of the Act was previously raised in two Commission proceedings decided by Judge Broderick in MSHA v. Waukesha Lime and Stone Company, Inc., VINC 79-66-PM, June 5, 1979, and MSHA v. Halquist Stone Company, VINC 79-118-PM, June 8, 1979. Addressing the general proposition that an administrative agency does not have the power to rule on constitutional challenges to an organic statute of an agency, Weinberger v. Salfi, 422 U.S. 749 (1975); Johnson v. Robison, 415 U.S. 361 (1974); Public Utility Commission v. United States, 355 U.S. 543 (1958); Spregel, Inc. v. FTC, 540 F.2d 287 (7th Cir. 1976), Judge Broderick nonetheless ruled that it is the responsibility of an administrative agency to determine whether a provision of the statute it administers may constitutionally be applied to the facts found by the agency, that construction of its organic statute is peculiarly the duty of the agency, and that a cardinal rule of construction requires that if possible, a statute be construed to avoid conflict with the Constitution, NLRB v. Home Center Management Corporation, 473 F.2d 471 (8th Cir. 1973). Judge Broderick concluded that the mining industry is a pervasively-regulated industry, and that as such, warrantless nonconsensual inspections are mandated by the Act and do not constitute unreasonable searches prohibited by the fourth amendment to the Constitution. I agree with his conclusions.

In disposing of the constitutional challenges on the warrantless search issues raised in Waukesha Lime and Halquist Stone, Judge Broderick relied on the requirements of section 103(a) that MSHA inspectors make frequent inspections of mines, and the Senate Committee Report stating that the language "shall have a right of entry to, upon, or through any coal or other mine" was intended by the Committee "to be an absolute right of entry without need to obtain a warrant." S. Rep. No. 95-181, 95th Cong., 1st Sess., 14 (1977), note 3 at 615. Further, Judge Broderick relied on recent court decisions holding that warrantless searches of coal mines authorized by the Act do not contravene the fourth amendment. Youghiogheny & Ohio Coal Company v. Morton, 364 F. Supp. 45 (S.D. Ohio, 1973); accord United States v. Consolidation Coal Company, 560 F.2d 214 (6th Cir. 1977), vacated and remanded, 436 U.S. 942, 98 S. Ct. 2481 (1978), reinstated, 579 F.2d 1011 (1978).

I believe it is clear from the legislative history of section 103(a) that Congress intended to confer on the Secretary broad inspection authority over the mining industry under his jurisdiction for the purpose of insuring compliance with mandatory health and safety standards. This authority granted by Congress includes the right-of-entry to a mine without advance notice and without the necessity of obtaining a warrant. The authority granted the Secretary under section 103(a) permits mine entry and access by MSHA to places from which it would normally be otherwise excluded by persons having fourth amendment rights in such places. Further, it seems clear to me that in order to carry out an effective enforcement program, Congress deemed it necessary to confer on the Secretary the right-of-entry for the purpose of ascertaining and insuring compliance with the Act and the promulgated mandatory health and safety regulations. As the Supreme Court noted in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978):

> [C]ertain industries have such a history of government oversight that no reasonable expectation of privacy could exist. Thus, there is a well-established exception to the search warrant requirements of the Constitution, Fourth Amendment, * * * for 'pervasively regulated businesses' * * * and for 'closely regulated' industries 'long subject to close supervision and inspection' * * * Idem, quoting from United States v. Biswell, 406 U.S. 311, 316 (1972), and Colonnade Catering Corp. v. United States, 397 U.S. 72, 74 (1970).

In Marshall v. Nolichuckey, supra, the district court observed that since Congress determined that the mining industry is such a closely-regulated industry, regulation of that industry falls within the Biswell-Colonnade exception to the fourth amendment's warrant requirements, and the court cited the legislative history of the 1977 Act which noted that "[s]afety conditions in the mining industry have been pervasively regulated by Federal and State law." 3 U.S. Code Cong. & Admin. News (1977), p. 3427. The court also took note of the fact that:

> [A]s to the coal mining industry, it has been determined in this circuit that such industry has a history of close federal regulation under the aegis of the commerce clause, United States v. Consolidation Coal Co., 560 F.2d 214, 220 (6th Cir. 1977), vacated and remanded (1979) ____ U.S. ____, 56 L.ed 783, Judgment and opinion reinstated on remand,

579 F.2d 1011 (1978), Youghiogheny and Ohio Coal Company v. Morton, 364 F. Supp. 45, 49 (D.C. Ohio 1973).

On appeal and affirmance, the Sixth Circuit in Nolichuckey, observed as follows at 606 F.2d 693, slip op., page 7:

> We conclude that the enforcement needs in the mining industry make a provision for warrantless inspections reasonable. The Act also contains privacy guarantees which are sufficient. As construed by this court, Section 201(a) and (b) of the Act permits warrantless inspections only of the "active workings" of coal mines. A warrant is required for the inspection of offices and other areas where the operator has a general expectation of privacy. See United States v. Consolidation Coal Co., 560 F.2d 214, 217 (6th Cir. 1977), vacated and remanded, 436 U.S. 942 (1978), judgment reinstated, 579 F.2d 1011 (1978). The same limitation would apply to sand and gravel "mines." Further, the statute provides for participation in all inspections by a representative of the operator. Finally, refusal of an operator to permit an inspection does not lead to summary imposition of sanctions. The Act provides for institution of a civil action by the Secretary of Labor seeking an injunction or other appropriate order.

In Marshall v. Stoudt's Ferry Preparation Company, supra, the Fourth Circuit stated as follows at 602 F.2d 593-94:

> Mindful of the Supreme Court's reluctance to foreclose the incremental protection afforded a proprietor's privacy by a warrant, we are persuaded that the Mine Safety Act's enforcement scheme justifies warrantless inspections and its restrictions on search discretion satisfy the reasonableness standard reasserted in Barlow's. Although the Mine Safety Act's coverage of enterprises has been broadened from that of the predecessor Coal Mine Safety Act to include other than coal mining, the statute is still much more limited than OSHA and is aimed at an industry with an acknowledged history of serious accidents. Moreover, unlike OSHA, the Mine Safety Act mandates periodic inspections and is specific in that no advance warning is to be given when the inspection is to determine whether an imminent danger exists or whether there is compliance with mandatory health and safety standards or with any citations, orders, or decisions outstanding, 30 U.S.C.A. § 813(a).

In another recent Fourth Circuit decision, Marshall v. Charles T. Sink, d/b/a Sink Coal Company, No. 77-2614, January 24, 1980, the court affirmed the district court's decision upholding the warrantless routine inspection of a mine, and relied on Barlow's, the Colonnade-Biswell exception, Stoudt's

Ferry, *Nolichuckey*, and *Youghiogheny*. *See also*, *Marshall* v. *Texoline Company*, Civil No. CA 4-78-49, Northern District of Texas, March 23, 1979, where the court upheld the Secretary's warrantless search of a limestone mine on the basis of *Barlow's*, *Colonnade-Biswell*, and *Youghiogheny*. I take note of the court's observation in *Sink* that the Secretary *must* seek an injunction when he is refused entry to a mine and that this procedure permits operators to present their objections to a district court *before* an inspection takes place to any sanctions that are imposed. This statement by the court is not altogether accurate since the injunction provision of 30 U.S.C. § 818 is *permissive* and not mandatory, and refusal of entry may result in a citation or closure order pursuant to section 104(a).

It seems clear to me from the aforementioned decisions, that the courts have accepted the strong presumption of the constitutionality of the warrantless inspection provisions of section 103(a), as well as the proposition that the *Barlow's* situation regulating business in general is readily distinguishable from the enforcement scheme fashioned by Congress under the 1977 Mine Safety and Health Act which relates to a *single mining industry* which has had a history of close Federal regulation and supervision, a fact specifically recognized by the Supreme Court in *Barlow's*.

May An MSHA Inspector Use A Camera To Document Conditions Or Practices Which He Believes Constitutes Violations Of Mandatory Health Or Safety Standards?

In my view, the taking of a photograph by an inspector at the time the condition or practice which he believes constitutes a violation of a mandatory standard is observed is no different than an inspector taking notes, making diagrams of the scene, making measurements with a rule or tape, or otherwise documenting the conditions observed by him with the naked eye. If a citation results from such an inspection, the inspector's concern should be to fully document the conditions and to describe them in such a manner so as to put the mine operator on full and fair notice as to what is required to achieve abatement so as to timely correct the hazard. If this is done, the inspector not only achieves compliance with the least amount of friction, but is also in a position to back up his citation with credible evidence in the event the citation is challenged. During the initial inspection, if a citation should issue, the inspector does not at that point in time know that it will be formally challenged through the hearing process, and in this setting, Climax's suggestion that he is acting as an agent of the Solicitor's Office is somewhat farfetched. The taking of a photograph merely documents the inspector's visual observations, and I conclude that it is an extension of his inspection and the camera is merely a tool to aid him in that inspection. In my view, a pocket instamatic or similar camera carried by the inspector during his inspection rounds, so long as it is confined to that use while making observations of conditions or practices which he believes constitute a violation, is no different than a pad of paper and pencil on which the inspector records notes and other observations.

I believe that the use of cameras by an inspector may, under the circumstances discussed above, serve as a useful tool to resolve credibility questions surrounding routine violations which may involve judgment calls on the part of the inspector which are at odds with those of mine management officials who may view the same conditions and come to different conclusions. The use of a camera is particularly useful and critical in situations involving imminent dangers, accidents resulting from violations, and situations where the conditions are likely to change after the occurrence of the event which prompted the citation or order. Further, the use of a camera cuts both ways; for just as an inspector may use a photograph to support a violation, a mine operator is free to use a camera to establish the lack of a violation. As an example, I cite the following three OSHA cases, recognizing the fact that OSHA has a specific regulation authorizing the use of cameras by its compliance officers.

In Beall Construction Company, 1971-1973 CCH OSHD 15,223, the judge observed that conflicting testimony as to the condition of a ladder on a construction site could have been easily resolved by a photograph. The Secretary's failure to submit a photograph resulted in his failure to prove a violation.

Marino Development Corporation, 1971-1973 CCH OSHD 15,478, concerned an unshored trench cave-in fatality, and one of the witnesses called by the Secretary was a police sergeant who was called to the scene and who took pictures within minutes after the occurrence of the event. The judge found the pictures to be of great value in determining the weight and credibility to be given to the testimony of the witnesses with respect to the critical issue of the depth and width of the trench as well as other prevailing conditions.

W. J. Lazynski, Inc., 1971-1973 CCH OSHD 15,184, concerned a case in which the judge concluded that the Secretary had failed to establish by his evidence that two nonserious violations had occurred as a result of the alleged presence of debris in a working area in violation of a mandatory standard. Photographs taken by the respondent, coupled with the testimony of the company president, convinced the judge that the materials cited were not "debris," but in fact materials stored and stacked for reuse. The judge found no violation.

The use of photographs in proceedings before the Department of the Interior and the Commission pursuant to the 1969 and 1977 statutes has been an ongoing practice by both MSHA and mine operators, and as far as I know, no prior objections or questions have been raised as to the right of an inspector or a mine operator to use a camera to support their respective positions with respect to the fact of a violation. Of course, the use of photographs has been limited to questions of their admissibility at the hearing pursuant to the established rules of evidence; see, e.g., Mountaineer Coal Company, 6 IBMA 308 (1976), where the judge attributed no weight to an operator's photographs of a mine area submitted to establish that float coal dust did not exist as alleged in the notice of violation on the ground that the photographs distorted the true prevailing conditions. See also, my decision of July 3, 1979, in MSHA v. Lone Star Industries, VINC 79-21-PM, July 3, 1979, where photographs taken and submitted by the mine operator were extremely useful in resolving credibility problems concerning certain alleged unguarded pinch points on a conveyor belt system. In Lone Star, a number of photographs were taken by the operator to support its conclusions that the locations cited were adequately guarded, and at the hearing MSHA utilized some of the photographs (with the consent of the mine operator's counsel) to establish some of the citations, while others were used as the basis for vacating several citations.

In Climax Molybdenum Company v. MSHA, DENV 78-581-M, an imminent danger review proceeding decided by Judge Cook on December 28, 1979, MSHA sought to introduce as evidence at the hearing, photographs of a piece of equipment taken by an MSHA inspector after the case was in litigation. The withdrawal order was issued on August 31, 1978, Climax filed its application for review on September 28, 1978, and the hearings were conducted between November 28, 1978, and February 1, 1979, The pictures were taken by the inspector on December 13, 1978, while at the mine lawfully during the course of his normal inspection duties.

Climax strenuously objected to the admission of the photographs into evidence in the proceeding and noted that the issue presented was not whether the photographs were accurate representations of what the inspector observed at the time they were taken, but rather, Climax framed the issue as "whether photographs or other evidence obtained after litigation on a citation or order is begun can properly be admitted when those photographs are not obtained in compliance with the Discovery Rules" (Cook decision, p. 8). Quoting from Climax's brief, its argument as posed to Judge Cook, was as follows:

> Climax has no right of access to either interview inspectors or obtain copies of inspector's notes outside of the context of the Discovery Rule. MSHA must be required to follow those rules also and the only suitable means for requiring that is to exclude from evidence all documents, photographs, or similar materials which are obtained outside the bounds of the Commission's Discovery rules. This is not to say that MSHA inspectors should be prohibited from returning from the scene of alleged violations after a citation has been issued is [sic] a part of determining whether abatement has been accomplished. It is to say however that if that matter is in litigation that any photographs or statements taken by an inspector after the application for review has been filed or any documents which are obtained by inspector requests after litigation has been initiated should not be admitted into evidence unless those documents are obtained through the Discovery processes provided for in the Rules. To rule otherwise would establish an unfair and arbitrary scheme which cannot be sustained,

> particularly in view of the presence of the Discovery Rules. Climax is obligated to comply with the Commission's Rules and MSHA must comply with them as well. It would clearly be inappropriate to give MSHA this unfair advantage in administrative litigation.
>
> No effort was made to comply with the Discovery Rules in taking the photographs. Because litigation was pending and those rules were not complied with, and further because in addition Climax was given no opportunity to have either a knowledgeable electrician or its attorneys involved in the taking of the photographs, Exhibits M-14 [sic] through M-17 inclusive should not be admitted into evidence.

MSHA's arguments concerning the admissibility of the photographs were that (1) there was no showing that Climax was in any way prejudiced by the introduction of the photographs, which were offered solely as an aid to the court in perceiving the work area of the mine involved; (2) the taking of photographs did not involve an attempt to question Climax's agents without the presence of counsel; and (3) at the time the photographs were taken, MSHA personnel were present in the mine lawfully during the course of their normal inspection duties.

In overruling Climax's objections and admitting the photographs, Judge Cook cited McCormick, Handbook of the Law of Evidence, section 214 at 530-31 (2nd ed., E. Cleary, 1972), which discussed the use of photographic evidence in judicial proceedings as follows:

> The principle upon which photographs are most commonly admitted into evidence is the same as that underlying the admission of illustrative drawings, maps, and diagrams. Under this theory, a photograph is viewed merely as a graphic portrayal of oral testimony, and becomes admissible only when a witness has testified that it is a correct and accurate representation of relevant facts personally observed by the witness. Accordingly, under this theory, the witness who lays the foundation need not be the photographer nor need he know anything of the time, conditions, or mechanisms of the taking. Instead he need only know about the facts represented or the scene or objects photographed, and once this knowledge is shown he can say whether the photograph correctly and accurately portrays these facts. Once the photograph is thus verified it is admissible as a graphic portrayal of the verifying witness' testimony into which it is incorporated by reference. [Footnotes omitted.]

Relying on the aforesaid passage from McCormick, Judge Cook concluded that a photograph serves merely as a graphic portrayal of a witness' oral testimony, into which the photograph is incorporated by reference, and that unlike evidence submitted under an exception to the hearsay rule, a photograph is not introduced ordinarily as independent proof of the truth of the matters asserted therein. Noting that the photographs were offered as graphic aids in interpreting what the MSHA inspectors observed at the time the order issued, Judge Cook reasoned that to the extent that they set forth an accurate graphic portrayal of the conditions observed by the witnesses at the time of the event in question, they were relevant to the subject matter of the hearing within the meaning of Commission Interim Rule 29 CFR 2700.50, which was then in effect and which provided that "[a]ny relevant evidence may be received at the discretion of the Judge. The Judge may exclude evidence which he finds to be unreliable or unduly repetitious." Judge Cook also took note of the fact that the record did not support the conclusion that the inspector who took the photographs attempted to interrogate Climax's agents, and that since the photographs merely related back to conditions already observed at the time the order issued, he concluded further that the taking of the photographs did not amount to an interrogation of Climax's agents.

Commenting on MSHA's failure to comply with Commission Rule 29 CFR 2700.46, which provided in part, "For good cause shown, the Judge may order a party to produce and permit inspection, copying or photographing of designated documents or objects relevant to the proceeding," Judge Cook nonetheless observed that:

> [W]e are now faced with an accomplished fact and a consideration of whether evidence which would be helpful to the ultimate determination of the case should now be received in evidence. It could be argued that MSHA's request for admission of the pictures in evidence is in effect a motion for ratification of the act of obtaining discovery by photographing of objects.

He concluded that Climax had not been prejudiced by the admission of the photographs and that they were helpful in understanding the issues presented in the case (Cook Decision, pp. 10-11).

Climax requests that I take official notice of the record adduced in the case before Judge Cook (Initial Brief, p. 11), and it seems obvious that it wishes me to take official notice of the fact that the photographs in that case were taken in the midst of litigation while the hearings were in recess. I have noted this fact, and I conclude that there is a distinction in a situation where an inspector takes pictures after the fact and while the case is in litigation without notice to the operator, and the facts presented in the instant proceedings where Climax apparently seeks to deny MSHA the right to take pictures at any time. In Judge Cook's situation, I may have sustained Climax's objections to the introduction of photographs taken after the citation was issued and while the case was in a litigation and hearing posture without notice to Climax's attorneys. In other words, although Climax may arguably be correct in its conclusion that photographs taken after litigation is begun is in the nature of discovery and may only be introduced in compliance with the Commission's discovery rules, the question of whether photographs in general are permissible at all is, in my view, a question of first impression to be decided by me on the basis of the record presented in the instant proceedings.

In a series of OSHA cases involving alleged violations of fourth amendment rights for failure by OSHA's compliance officers to properly identify themselves by displaying their credentials or affording the respondent the opportunity to accompany the inspector on his inspection rounds, both of which were statutory requirements, both the Commission and the courts, on the facts presented, viewed these requirements as procedural defects which did not prejudice the respondents or otherwise violate their fourth amendment rights. See Accu-Namics, Inc. v. OSHRC, 515 F.2d 828 (5th Cir. 1975); Hoffman Construction Company v. OSHRC, 546 F.3d 281 (9th Cir. 1976).

In United States v. Minton, 488 F.2d 37 (4th Cir. 1973), the court affirmed the conviction of a defendant for violation of certain liquor laws which was based on evidence seized as a result of observations of illegal activities through binoculars and the subsequent seizure of evidence without the benefit of a search warrant resulting from those observations. The court there ruled that the illegal activity was in "plain view," and that in these circumstances there was no reason for expectation or privacy and no requirement for a search warrant.

In Environmental Utilities Corporation, 1977-1978 OSHD 21,709, April 4, 1977, an OSHA inspector entered the premises for the purposes of an inspection, and after observing certain conditions which he believed were violations of safety regulations, returned to his car to get a camera. Upon his return, he photographed the alleged violative conditions and testified that photographs were required because there was an immediate possibility that working conditions would change. The photographs were taken at a time when a company representative was not present, and the Commission rejected the company's fourth amendment arguments that the inspector had not identified himself as an inspector and did not afford the company an opportunity to be present when the photographs were taken. The Commission noted that the nature of the work practices in effect at the time the violation was cited supported the inspector's belief that immediate action was necessary to preserve evidence.

Minotte Contracting & Erection Corporation, 1978 OSHD 22,551, February 7, 1978, concerned a case where an OSHA inspector took photographs of certain conditions which he believed were violations from a public roadway prior to presenting his credentials to the company upon his arrival on the premises. The citations based on these photographs were affirmed by the Commission, and it rejected the company's fourth amendment arguments seeking to exclude the photographs and it did so on the ground that the conditions were in "plain view," that the company was not prejudiced, and that in the circumstances, the company could not claim a reasonable expectation of privacy protected by the fourth amendment particularly where the worksite was open to public view.

In Laclede Gas Company, 1979 OSHD 24,007, October 31, 1979, the Commissioni rejected a company's assertion that photographs taken by an OSHA compliance officer by means of a telephoto lens camera from a highway prior to his arrival on the premises and displaying his credentials should be excluded as evidence of any violations, and it did so on the basis of the "plain view" doctrine, and its prior decisions in Environmental Utilities Corporation and Minotte Contracting, supra.

Although I recognize the fact that in these OSHA cases the Commission's application of the "plain view" doctrine involved situations where the worksite and the resulting violations were in effect in the public domain, I see little distinction in a situation where an MSHA inspector has a statutory right of access to mine property without the necessity of a warrant and while there in the course of his authorized inspection duties observes conditions which he believes violate the law. Although an underground mine area is not necessarily in the public domain, the fact is that the conditions observed by an inspector are in his plain view, and in these circumstances, I conclude that an operator may not at that point in time reasonably claim any right of privacy insofar as the documentation of those conditions are concerned. Just as the inspector is free to take notes, measurements, and make sketches and diagrams of the scene, I believe he is also free to record the conditions observed by means of a camera. Any subsequent use to be made of those photographs is a matter which I believe should be left to the adjudicatory discretion of the judge on a case-by-case basis. Since Congress and the courts have recognized the fact that the mining industry is a pervasively-regulated industry, I am not convinced that the use of cameras to assist the Secretary in his regulation of that industry is a practice which should generally be proscribed by the fourth amendment or the Act.

There is one area of contention in these proceedings which I believe the Secretary should take serious note of and take some corrective action. This concerns Climax's argument that the Secretary has engaged in no formal rulemaking to fix the circumstances and guidelines under which cameras are to be used. As pointed out by Climax, OSHA has a specific regulation authorizing the use of cameras and has also published detailed instructions to its compliance officers with respect to the circumstances under which they are to be used. Climax's arguments that the lack of specific guidelines gives rise to possible abuses and unwarranted intrusions into its mining business and operations are well taken. While I do not believe that its arguments may serve as a basis for interdicting the general use of cameras during an inspection, I believe that reasonable ground rules should be established by the Secretary and communicated to the industry in order to preclude potential abuses and to ensure even-handed enforcement. The practice of some MSHA districts using cameras, while others do not, and the practice of using them to regulate one class of mining operations as opposed to another, may in certain circumstances result in arbitrary and confused enforcement practices which I believe should not be permitted. For example, MSHA's reliance on its April 30, 1979, memorandum to support its contention that cameras are authorized and used throughout its inspector force is somewhat suspect because that memorandum is addressed only to metal and nonmetal district managers, and not to coal districts, and its effective date is after the refusal incident which prompted the instant proceedings. If distinctions are to be made, MSHA should address this question head on and communicate this to the industry as a whole. Care should also be taken that in this process, MSHA does not put itself in the position of having its inspectors act as trial lawyers. Further, it should be readily apparent to MSHA that reasonable precautions should be taken to insure that hazardous conditions will not be created by flash or spark-producing camera equipment. Inspectors should be adequately trained in the use of camera equipment, and they should insure that the taking of pictures are not done in such a manner as to distract the workforce while they are engaged in their mining duties. Such distractions may expose a miner to hazards and potential injuries which he otherwise would not have been exposed to but for the presence of an inspector armed with camera equipment.

After careful consideration of all of the arguments presented, I conclude that Climax's suggestions that the taking of photographs is per se prohibited must be rejected. Of course, if an operator can establish that the inspector abused his authority by taking photographs unrelated to a citation, that the taking of a photograph posed a mine safety or health hazard in a given situation, or that the taking of photographs unduly interferes with or disrupts the mining process, he can raise this with the judge on a case-by-case basis, and seek remedial action for such enforcement practices. In the instant proceedings, Climax does not assert that this is the case. Rather, it seeks a general exclusion of the use of cameras by MSHA's inspectors during the course of their mine inspection.

I recognize the fact that Climax has a legitimate right to protect the confidentiality of its mining processes as well as any unwarranted disclosure of any trade secrets which may result from an entry by an inspector to its mine property and the subsequent taking of pictures which may end up as part of a public record in any subsequent adversary litigation. However, the possibility of this happening may not, in my view, serve as a general prohibition of the use of cameras or the taking of pictures by an inspector during the course of an authorized inspection of the mine for the purpose of insuring compliance with mandatory health and safety standards.

In my view, the use of cameras should be limited to the specific condition or practice which the inspector believes is a violation. If the taking of the photograph exposes the operator to a possible disclosure of trade secrets and mine procedures which he believes should be protected from public disclosure, he is free to seek an appropriate protective order or to request an "in-camera" limitation on the use of such photographs. This was precisely the method used in several OSHA-reported cases which held that the appropriate method for protecting such secrets was the use of protective orders. See: American Can Company, November 30, 1979, 7 Occupational Safety and Health Reporter, 1947, noted in 48 L.W. 2431, January 1, 1980; Owens-Illinois, Inc., 1978 OSHD 23,218.

May An MSHA Inspector Use A Camera And Take Photographs After Litigation Is Begun Solely For The Purpose Of Use At A hearing Without Prior Discovery Notice Given To the Operator?

In its reply brief, Climax seemingly concedes that MSHA is not forever precluded from using photographic equipment or from introducing photographs as evidence in a hearing. Climax views the "sole issue" to be whether MSHA is statutorily authorized to take photographs during a warrantless inspection solely for use as evidence in an enforcement hearing, and in support of this argument takes the position that the taking and use of photographs for hearing purposes must be governed by the Commission's discovery rules, 29 CFR 2700.57, and must be authorized and regulated by the presiding judge. Climax's argument seems to be that photographs taken by an inspector during his initial inspection, and which are limited to documenting the conditions he observes is permissible, but if the photographs are to be taken after litigation begins, their taking and use must be specifically authorized and regulated by the judge pursuant to the normal discovery rules.

As indicated earlier, I have concluded that the use of cameras and photographs taken at the time the inspector initially observes conditions and practices which he believes constitute violations of the Act or any mandatory safety standards is within the authority granted an inspector under the right-of-entry provisons of section 103(a) of the Act, and it matters not that the photographs will at some future time be used by the Solicitor to establish a contested violation at the hearing. However, on the facts presented in these proceedings before me, there is no indication that the inspectors attempted to take photographs after the start of litigation and solely for use at the hearing as was the situation in the prior Climax case before Judge Cook. As a matter of fact, the stipulation entered into and filed by the parties in the instant proceedings on October 17, 1979, is limited to the question of whether MSHA inspectors may use cameras and take photographs during the course of regular mine inspections, and the stipulated facts reflect that MSHA inspectors were refused the right to bring their instamatic cameras with them onto mine property when they appeared for regular inspections. The citation and order at issue in these proceedings resulted from Climax's refusal to permit the inspector to use a camera in the mine to document any violations which may result from his routine inspection.

Climax's counsel has attempted to expand the factual situation in these proceedings to those which were presented in the case before Judge Cook by expanding his legal arguments in the brief and reply brief to the question of whether photographs taken solely for the purpose of use at an adversary hearing are permissible. The problem with this approach is that there are no facts present in these proceedings which lead me to conclude that the inspectors attempted to use cameras solely for litigation purposes when they appeared at the mine on April 18, 1979, for the purpose of conducting a regular mine inspection. The fact that I have taken note of the prior litigation before Judge Cook cannot serve as the basis for my deciding an issue which was before him and not before me. It seems to me that Climax should have preserved its appeal rights by filing an appeal of Judge Cook's decision addressing the very issue which Climax is attempting to address here by means of legal arguments based on proposed stipulated facts which are not before me. Under the circumstances, my findings and conclusions in these proceedings are limited to the question of whether MSHA inspectors may generally use cameras and take photographs of conditions and practices alleged to be violations at the time of their initial inspections. I have answered this question in the affirmative, but I make no findings or conclusions as to whether the use of cameras or the taking of photographs after litigation is begun solely for the purpose of use at a hearing without notice or without resort to the appropriate discovery rules of the Commission is permissible under the Act, and I have declined to do so because those facts are not before me.

May A Mine Operator Be Cited Under Section 103(a) Of The Act For Refusal To Permit MSHA Inspectors To Take Photographs Of Mine Conditions Which They Believe Constitute Violations?

In view of my finding and conclusion that the use of cameras by MSHA inspectors is not an invasion of privacy prohibited by the fourth amendment but merely an extension of the inspection specifically authorized by section 103(a), without the need for a warrant, I conclude that Climax's refusal to permit the use of cameras, while not directly a refusal of the right-of-entry, does constitute a violation of that section for which a civil penalty may be assessed. The amount of such a penalty must, however, be determined on the facts of each case, and my findings and conclusions on this issue follow.

As indicated earlier in this decision, the civil penalty proceeding has been consolidated with the contest filed by Climax. MSHA takes the position that the refusal of Climax to permit the use of cameras constitutes a violation of section 103(a), and that pursuant to section 104(a), which mandates a civil penalty for violations of the Act, Climax may be assessed a civil penalty for a violation of section 103(a). In support of its argument, MSHA asserts that the refusal by Climax to permit the use of cameras amounts to hindering and impairing MSHA's ability to carry out its inspection duties under section 103(a). MSHA equates this refusal by Climax to allow the taking of photographs to intimidation of the inspector. Climax takes the position that there is no evidence of intimidation or harrassment of the inspector, and the record is devoid of any facts to suggest that this occurred in this case. I agree. There is no evidence of record to support the conclusion that that inspector was refused entry or was otherwise prohibited from conducting his normal inspection. The inspector was simply advised that he could not use a camera, and there is nothing to suggest that he was otherwise limited in the manner in which he conducted his inspection on the day in question.

MSHA's initial proposed civil penalty was for $500. The Assessment Office "worksheet" which is part of MSHA's pleadings, simply reflects a proposed penalty of $500, and no assessment "points" were assigned for any of the six statutory criteria set forth in section 110(i) of the Act. Since it is well settled that any civil penalty assessment levied by me is de novo, without regard to any assessment formula utilized by MSHA in its initial evaluation of the penalty, I will assess a penalty based on the facts of record.

The parties filed supplemental briefs addressing the question of an appropriate civil penalty for Climax's refusal to permit the use of cameras. MSHA takes the position that Climax's refusal to permit the use of cameras hindered its ability to carry out its duties under the Act and that the violation was serious. MSHA also believes that since the violation resulted from Climax's intentional conduct to test the extent of MSHA's inspection authority, Climax was negligent, and since an order resulted from Climax's refusal to abate the citation, MSHA concludes that no finding of good faith is warranted. MSHA also cites Climax's moderate history of prior violations and now seeks a civil penalty assessment of $150.

Climax concedes that it is a large mine operator and that MSHA's proposed penalty will have no effect on its ability to continue in business. However, Climax argues that its refusal to permit the use of cameras was based solely on its desire to administratively challenge MSHA's use of photographic equipment, and that it in no way harrassed, intimidated or otherwise disturbed the inspectors. In fact, Climax asserts that it cooperated with the inspectors with respect to the remainder of the inspection and made known to the inspectors the purpose of its objection to the use of photographic equipment. In these circumstances, Climax argues that it should not be penalized for exercising its right administratively to challenge the validity of an MSHA procedure by the imposition of a severe civil penalty. Further, since the application of the six statutory criteria of section 110(i) are specifically designed for the purpose of deterrence, and since operators should not be deterred from bringing genuine test cases, Climax asserts that the statutory criteria should be disregarded in favor of the imposition of a nominal or token penalty of no greater than $10.

After careful review of the arguments presented, including the record here presented, I conclude that Climax has the better part of the argument and I agree with its position with respect to the assessment of a civil penalty on the basis of the facts presented in these proceedings. I cannot conclude that Climax intimidated or otherwise harrassed the inspectors in this case. To the contrary, I conclude that Climax's refusal to permit the use of cameras on its mine property was based on what it honestly believed to be a constitutionally-protected right of privacy and its desire to challenge MSHA's assertions to the contrary. As correctly pointed out by Climax in its arguments, it must first exhaust its administrative remedies before seeking court review of its asserted right to be left alone, and the initial step in this administrative review process is to provoke the issuance of a citation. Absent any credible evidence that Climax harrassed the inspector or otherwise impeded him in the conduct of his inspection, I cannot conclude that the refusal to permit him to use a camera constituted a refusal of entry per se warranting a substantial civil penalty assessment. Since this case is a case of first impression, and considering the prior proceeding before Judge Cook, I am convinced that Climax's refusal to permit the use of a camera was based on its desire to provoke a "test case," rather than to deliberately obstruct the right of the inspector to go about his normal inspection duties. This is not the first enforcement proceeding involving Climax Molybdenum Company, and to my knowledge, it has never refused an MSHA inspector the right-of-entry on its mine property for the purpose of conducting an inspection.

MSHA's argument regarding the severity of the violation, including its arguments and conclusions that the refusal to permit the use of cameras is per se harrassment and intimidation of its inspectors, are rejected. While the refusal by an operator to permit an inspector to take with him equipment directly related to safety may be considered serious, on the facts in this case, I cannot categorically characterize a camera as a safety-oriented piece of equipment. For example, while a methanometer, anemometer, and noise-measuring devices directly measure compliance or noncompliance with a specific mandatory safety standard, the use of a camera during the inspectioin is in the final analysis an additional tool to aid the inspector in pictorially preserving conditions he observes. Those conditions may or may not amount to a violation, and in this context, the value of a camera is in the credibility it lends to any testimony by the inspector in a contested case.

Climax concedes that the citation resulted from its intentional conduct to test MSHA's authority to use cameras during an inspection. While this may amount to negligence in the ordinary sense, given the factual setting which provoked the citation in the first place, I cannot conclude that an increase in any civil penalty is warranted because of the negligence factor.

I take note of the fact that in this case, once the citation was issued and an abatement time fixed, the inspector issued a withdrawal order based on Climax's continued objections to the use of a camera and he specifically noted on the face of the order that no area of the mine should be closed. Under the circumstances, I fail to understand the rationale in issuing an order. The order did nothing to achieve compliance. It simply documented Climax's continued refusal to permit the use of cameras after being put on notiuce that the inspector believed he had a right to use a camera. In my view, the use of an order in these circumstances was inappropriate. However, since it did not close down mining operations, I can find no prejudice to Climax and I consider the order as simply a further documentation and indication of Climax's continued refusal to permit the use of cameras and do not believe that its mere issuance should serve as a basis for increasing any civil penalty assessment resulting from the violation. On the basis of the entire record here presented, I find that a civil penalty of $10 is appropriate.

Conclusion and Order

In view of the foregoing findings and conclusions, the citation and order issued in these proceedings are AFFIRMED, and Climax is assessed a civil penalty in the amount of $10 for its refusal to permit the use of a camera in its underground mine by an MSHA inspector during the course of an inspection, and Climax is ordered to pay that amount within thirty (30) days of the date of these decisions.

George A. Koutras
George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
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FALLS CHURCH, VIRGINIA 22041

FEB 26 1980

LOCAL UNION #6594, DISTRICT 17, UNITED MINE WORKERS OF AMERICA, on behalf of: Willard Newsome, Kyle Cline, Keith McCoy, Charles R. Stover, Walter Cooper, Orville Napier, Jack Matney, Robert Fields, Isaac Bryant, Frank Evans, Alvin Chapman, Bruce Cooley, Gregory Boggs, Andrew Miller, Phillip Springer, Bobby Robinson, Earl Hall, Tennis Canterbury, George Tiller, Larry Lester, William Workman, Kirby Cisco, Mearl Fields, Philip Jones, Danny Mahon, Kenneth Whited and Taby Cooley Applicants v. FMV COAL CORPORATION, Respondent	:	Application for Compensation Docket No. HOPE 77-128 No. 1 Mine

DECISION

Appearances: Peter Mitchell, Esq., United Mine Workers of America, Washington, D.C., for the Applicant.

Before: Judge Cook

I. Procedural Background

On January 24, 1977, Local Union #6594, District 17, United Mine Workers of America (Applicant) filed an application for compensation in the above-captioned proceeding pursuant to section 110(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1970) (1969 Coal Act). The application was filed with the Office of Hearings and Appeals of the United States Department of the Interior and the proceeding was pending on the effective date of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) (1977 Mine Act). Accordingly, the case is before the undersigned Administrative Law Judge of the Federal Mine Safety and Health Review Commission for decision. 30 U.S.C. § 961 (1978). The remainder of the procedural history subsequent to the filing of the application for compensation is set forth below.

On February 18, 1977, the Applicant filed a photocopy of a post office return receipt indicating that service of the application for compensation had been made upon FMV Coal Corporation (Respondent). Additionally, on the same day, the Applicant filed a motion to permit late filing of interrogatories to the Respondent in conjunction with copies of the proposed interrogatories. This motion was granted by an order dated March 3, 1977.

On March 9, 1977, the Applicant moved for an order to show cause why judgment in default should not be entered. On March 11, 1977, the Respondent filed a motion to file a late answer but failed to submit an answer in conjunction with the motion. The Applicant filed a statement in opposition to the Respondent's motion on March 21, 1977. Additionally, on March 21, 1977, the Respondent filed a letter in response to the Applicant's March 9, 1977 motion stating its opposition to the entry of a default judgment.

On March 25, 1977, a notice of hearing was issued setting the matter for hearing on April 21, 1977, in addition to an order granting the Respondent's motion to file a late answer and denying the Applicant's motion for an order to show cause why judgment in default should not be entered. The Respondent was accorded 10 days in which to file its answer. The answer was subsequently filed on April 4, 1977.

Pursuant to a mutual agreement by counsel for the parties, an order was issued on April 15, 1977, cancelling the hearing scheduled for April 21, 1977. The order noted that a telephone conference would be conducted on May 9, 1977, to determine whether a hearing would be necessary and, if so, to agree upon the date thereof.

The May 9, 1977, telephone conference was conducted as scheduled. It was agreed that the Respondent would mail answers to the Applicant's interrogatories by May 13, 1977. It was also agreed that a telephone conference would be held on June 20, 1977, absent a request by the parties for an alternate date. This agreement was reflected in an order dated May 9, 1977. The answers to interrogatories were filed on May 16, 1977.

The June 20, 1977, telephone conference was conducted as scheduled during which counsel for the Applicant stated that he contemplated the filing of further interrogatories and a request for admissions. Counsel for the Applicant further stated that he would consider the filing of a motion for summary decision depending upon the response received to the interrogatories and request for admissions. Counsel for the parties agreed to participate in a telephone conference on July 15, 1977, to determine both the status of the case and whether a hearing would be necessary. These matters were reflected in an order dated June 20, 1977.

The Applicant's requests for admissions were filed on July 1, 1977, and the Respondent's reply was filed on July 15, 1977.

The July 15, 1977, telephone conference was held as scheduled. Counsel for the Applicant indicated that he was considering the filing of a motion for summary decision. Accordingly, counsel for the parties were informed that no further telephone conferences would be held absent a specific request from either party, and that no further action would be taken by the undersigned Administrative Law Judge until either the receipt of such a request or the filing of a motion for summary decision or the filing of a request for a hearing.

Approximately 6 months elapsed during which no communications were received from the parties as to the status of the case. On January 17, 1978 and February 6, 1978, the undersigned Administrative Law Judge sent letters to counsel for the Applicant, with copies sent to the Respondent, requesting a written statement as to what further action the Applicant contemplated taking so that the disposition of the case could be expedited. On February 24, 1978, a communication was received from counsel for the Applicant stating both his reasons for the delay and that he would be filing a motion for summary decision. This motion was subsequently filed on April 14, 1978. On May 15, 1978, the motion was denied without prejudice to the right of the Applicant to renew a motion which would be properly documented.

On August 11, 1978, a letter was sent to counsel for the Applicant stating the necessity of taking action, either in the form of a motion for summary decision or a request for a hearing, in order to expeditiously bring the case to a conclusion. On September 1, 1978, counsel for the Applicant filed a letter which apprised the Judge that consultations with counsel for the Respondent had disclosed matters that could only be resolved at a hearing. Accordingly, a notice of hearing was issued on September 7, 1978, scheduling the case for hearing on the merits on November 21, 1978, in Charleston, West Virginia, contingent upon the Applicant's filing an amended application for compensation by October 16, 1978.

On October 17, 1978, the Applicant filed a motion for production of documents. On October 31, 1978, the Applicant filed a communication indicating that he was pursuing informal avenues to obtain the information sought by the motion for production of documents and suggested that a ruling on the motion be held in abeyance. Counsel further indicated that he would either withdraw or renew the motion upon completion of the informal steps previously undertaken. Additionally, counsel indicated that a postponement of the hearing would be needed by both parties.

On November 6, 1978, an order was issued continuing the hearing indefinitely and scheduling a telephone conference for November 22, 1978, which conference was held as scheduled. It was agreed that the following three steps would take place: First, the Applicant's attorney was to file an amended application for compensation after receiving certain information from the Respondent's attorney and from other sources. Second, the Respondent's attorney was to be accorded time to file an answer to the amended application. The attorney for the Respondent was to communicate with the attorney for the Applicant within 2 weeks after receipt of the amended application to indicate whether he would stipulate that the Applicant could file a second motion for summary decision in spite of the fact that a notice of hearing had already been issued. Third, the Applicant's attorney was to either file a motion for summary decision or request the Judge to set the matter for hearing. This agreement was reflected in an order issued on November 28, 1978.

A telephone conference was held on or around April 30, 1979, to determine the status of the case since no communication had been received from either party subsequent to the issuance of the November 28, 1978, order. The parties agreed to make arrangements for the receipt of certain information so that the Applicant's attorney could file an amended application by May 21, 1979. It was understood that the remaining two steps outlined in the November 28, 1978, order then would be executed as expeditiously as possible.

On May 11, 1979, the Applicant served interrogatories and a request for admissions on the Respondent. Copies were filed with the Judge on May 14, 1979.

As of June 25, 1979, 7 weeks following the above-noted telephone conference, the amended application had not been filed. Therefore, counsel for the Applicant was requested to apprise the Judge of the status of the amended application by July 5, 1979.

On July 6, 1979, the Applicant filed a document styled "Amended Application for Compensation and to Show Cause Why Default Judgment Should Not Be Entered." On August 13, 1979, an order was issued addressing issues relating to the Applicant's May 14, 1979, and July 6, 1979, filings and setting forth a schedule stating, in part, as follows:

> On May 14, 1979, the Applicant filed copies of interrogatories to Respondent and a request for admissions along with a certificate of service stating that copies of such documents had been mailed on May 11, 1979, to the Secretary-Treasurer of the FMV Coal Corporation as well as the Office of the Solicitor of the Department of Labor. However, the certificate of service did not show that it was mailed to the Respondent's attorney.
>
> On July 6, 1979, the Applicants filed an amended Application for Compensation and a request that an order be issued to the Respondent to show cause why judgement in default should not be entered in Local Union 6594's favor, on the application as amended, since the Respondent had not replied to either the interrogatories or the requests for admissions. The certificate of service attached to such document states that copies were mailed to the attorney for the Respondent as well as other persons. No response to such amended application or request for order to show cause has been received from the Respondent and the time permitted for response to such motions has expired. In addition, it has now been

> somewhat over 30 days since the amended Application for Compensation was served and no answer to that amendment has been filed by the Respondent.
>
> In view of the regulations relating to discovery, it is not considered that an order to show cause for default judgment is proper at this stage of the proceedings. However, in view of the facts contained in the record, it is considered good cause has been shown for the completion of discovery procedures beyond the time limitations set forth in the regulations applicable to these proceedings.
>
> Accordingly, IT IS ORDERED that the Respondent reply to such interrogatories and requests for admissions referred to above by August 31, 1979. 1/ As relates to the amendment to the application, such amendment is accepted as partial fulfillment of the directions contained in my order of May 15, 1978, which pointed out that the applicable regulations required the application to set forth the total amount of compensation claimed as well as the period for which such compensation is claimed. However, the period of the claim as set forth in paragraph 4 of the amended application filed July 6, 1979, is not sufficiently definite. Therefore, after the interrogatories have been answered, a further amendment to such application will be necessary to definitely set forth the specific days for which compensation is claimed.
>
> Accordingly, the Applicant will have until September 20, 1979, for the filing of such amendment to the application.
>
> Thereafter the Respondent will have until October 20, 1979, to answer the application as amended.
>
> Thereafter the hearing in this matter will commence at 9:30 a.m., October 30, 1979, unless agreement has been reached by the parties as to the right of the Applicants to file a motion for summary decision if such is in order at that time.

Footnote No. 1, supra stated that: "In view of the fact that the certificate of service relating to such documents did not show service upon the Respondent's attorney a copy of each of these two documents is attached as Appendix A."

On October 1, 1979, an order of continuance was issued stating the following:

> The hearing in the above-captioned case is now set for October 30, 1979. In the order setting such hearing, the date was premised upon the occurrence of two steps which had

> to occur prior to the hearing. They were the filing of an amended application which would specifically set forth the dates for which compensation is claimed by each of the miners involved, and thereafter the passage of 30 days after service of such amended application upon the respondent, during which the respondent could answer such amended application.
>
> Since the above referred to amendment to such application has not been served or filed, the time schedule will not permit the commencement of the hearing on October 30, 1979.
>
> In view of the fact that the Respondent did not respond to the interrogatories and requests for admissions served by the Applicant, a telephone conference was arranged by the undersigned Administrative Law Judge with the attorneys for the Applicant and the Respondent on September 24, 1979. During such telephone conference the attorney for the Respondent stated that the Respondent no longer desired that an attorney represent it because of financial problems. The result is that the Respondent's attorney apparently will not be filing answers to said interrogatories and requests for admissions. During such conference the Administrative Law Judge stated that the procedures for the subpoena of Respondent's officers for the purpose of a deposition could be carried out by the Applicant's attorney if such was necessary for the purpose of serving and filing an amended application.
>
> The attorney for the Applicant stated that some action would be forthcoming, as to an amended application, in the near future as to the service of an amended application.
>
> Accordingly the hearing in this case is CONTINUED INDEFINITELY pending the filing of the amended application and the passage of 30 days for answer thereto by the Respondent.
>
> As soon as action is taken by the Applicant as to such amended application, an order will be issued setting the matter for hearing.

On October 25, 1979, the Applicant filed a document styled "Supplemental Application for Compensation." The Respondent failed to file answers to either the July 6, 1979, amended application for compensation or the October 25, 1979, supplemental application.

An amended notice of hearing was issued on November 8, 1979, scheduling the case for hearing on the merits on December 18, 1979, in Logan, West Virginia. Subsequent thereto, the Applicant requested that the hearing be changed to a date in January, 1980. Amended notices of hearing were issued on November 27, 1979, and January 15, 1980, scheduling the case for hearing on the merits to commence at 10 a.m., January 30, 1980, in Bluefield, West Virginia. Additionally, on January 15, 1980, a prehearing order was issued advising the parties that a 5 day transcript would be ordered and that the time for filing any proposed findings of fact, conclusions of law or briefs would expire 10 days after each party ordering a copy of the transcript received its copy from the reporter.

The hearing was conducted as scheduled. The Applicant was represented by counsel. No one appeared to represent the Respondent (Tr. 5-6). 1/

During the course of the hearing, the Applicant moved to amend the caption to reflect the names of all miner-claimants and also moved to amend the supplemental application for compensation to conform with the proof. Both motions were granted (Tr. 49, 51-56).

The Applicant also moved for the entry of a default (Tr. 9, 58). However, in view of the decision in Rushton Mining Company v. Morton, 520 F.2d 716 (3rd Cir. 1975), discussed infra, it is deemed inappropriate to dispose of this case by way of a default.

The Applicant filed proposed findings of fact and conclusions of law on February 19, 1980. No posthearing filings were made by the Respondent.

Additionally, on February 19, 1980, the Applicant filed proof that on October 24, 1979, a copy of the October 25, 19789, Supplemental Application for Compensation was served on both Mr. T. I. Varney, the Respondent's Secretary-Treasurer, and John M. Richardson, Esq., the Respondent's then counsel of record.

II. Witness and Exhibits

(A) Witness

The Applicant called as its witness Richard C. Cooper, a safety inspector for the United Mine Workers of America.

(B) Exhibits

The Applicant introduced the following exhibits into evidence:

1/ It should be noted that the Respondent was represented by counsel during the prehearing stage of the proceeding. On November 9, 1979, counsel for the Respondent filed a motion for permission to withdraw his appearance. In spite of repeated requests, no certificate of service was filed prior to the hearing showing service of the motion on the Applicant. The motion was granted on the record after counsel for the Applciant acknowledged receipt of a copy of the motion and after counsel stated that he had no objection to the granting of the motion (Tr. 6-8).

A-1 is the affidavit of Fred T. Casteel, Subdistrict Manager in the Madison, West Virginia Subdistrict Office of the Mine Safety and Health Administration.

A-2 is the affidavit of Helen O. Mockabee, Chief of the Docket Section of the Federal Mine Safety and Health Review Commission.

A-3 is a copy of Order No. 1 GRB, December 13, 1976, 30 C.F.R. § 75.1101-5.

A-4 is a copy of Order No. 2 GRB, December 13, 1976, 30 C.F.R. § 75.1103-4(a).

A-5 is a copy of Order No. 3 GRB, December 13, 1976, 30 C.F.R. § 75.1100-2(b).

A-6 is a copy of Order No. 4 GRB, December 13, 1976, 30 C.F.R. § 75.200.

III. Issues

(1) Whether the miner-claimants are entitled to compensation under that portion of section 110(a) of the 1969 Coal Act which provides as follows:

> If a coal mine or area of a coal mine is closed by an order issued under section 104 of this title for an unwarrantable failure of the operator to comply with any health or safety standard, all miners who are idled due to such order shall be fully compensated, after all interested parties are given an opportunity for a public hearing on such compensation and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

(2) If the miner-claimants are entitled to compensation under the above-noted provision of section 110(a), then what is the amount of compensation due each miner-claimant?

IV. Opinion and Findings of Fact

On December 13, 1976, George Bowman, an authorized representative of the Secretary of the Interior, issued to the Respondent the following orders of withdrawal at the Respondent's No. 1 Mine: 1 GRB, December 13, 1976, 30 C.F.R. § 75.1101-5; 2 GRB, December 13, 1976, 30 C.F.R. § 75.1103-4(a); 3 GRB, December 13, 1976, 30 C.F.R. § 75.1100-2(b); and 4 GRB, December 13, 1976, 30 C.F.R. 75.200. The first three orders were issued at 9:45 a.m. and the remaining order was issued at 10:30 a.m. All four orders were issued pursuant to section 104(c)(1) of the 1969 Coal Act 2/ alleging violations of the above-noted mandatory safety standards caused by an unwarrantable failure on the Respondent's part to comply with the respective standards. (Exhs. A-1, A-3, A-4, A-5, A-6; Applicant's Requests for Admissions, Nos. 6, 7, 8, 9, 13, 14, 15, 16, filed July 1, 1977, and Respondent's Reply thereto, filed July 15, 1977). No modifications were issued as relates to any of the four orders and the four orders remained in full force and effect until their termination in March, 1977 (Exh. A-1). The records of the Federal Mine Safety and Health Review Commission were searched, and failed to show that the Applications for Review were filed by the Respondent as relates to the four orders (Exh. A-2).

The Respondent's No. 1 Mine had one coal producing section during December, 1976, and each of the four orders of withdrawal effectively idled the entire mine from the moment of their issuance. (See, Applicant's Requests for Admissions, No. 2, filed July 1, 1977 and Respondent's Reply thereto, filed July 15, 1977; Application for Compensation, Paragraph No. XII, filed January 24, 1977 and Respondent's Answer, Paragraph XII, filed April 4, 1977).

Between December 1, 1976, and December 10, 1976, the Respondent operated two daily production shifts at the No. 1 Mine, the 7 a.m. to 3 p.m. shift and the 3 p.m. to 11 p.m. shift. (See, Applicant's Requests for Admissions, No. 3, filed July 1, 1977 and Respondent's Reply thereto, filed July 15, 1977.) There were no non-production shifts. (See, Applicant's Interrogatories to Respondent, No. 6, filed February 18, 1977 and Respondent's Answers thereto, filed May 16, 1977).

2/ Section 104(c)(1) of the 1969 Coal Act provides:

"(c)(1) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any notice given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within ninety days after the issuance of such notice, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

The Respondent's No. 1 Mine is a bituminous coal mine whose operations or products affect interstate commerce. (See, Applicant's Requests for Admissions, No. 1, filed July 1, 1977 and Respondent's Reply thereto, filed July 15, 1977).

The Applicant seeks one week's compensation on behalf of 27 miners idled by the above-noted orders of withdrawal. Compensation is sought under that portion of section 110(a) of the 1969 Coal Act, which provides that:

> If a coal mine or area of a coal mine is closed by an order issued under section 104 of this title for an unwarrantable failure of the operator to comply with any health or safety standard, all miners who an idled due to such order shall be fully compensated, after all interested parties are given an opportunity for a public hearing on such compensation and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

As noted by the Court in Rushton Mining Company v. Morton, 520 F.2d 716, 720 (3rd Cir. 1975), compensation under this portion of section 110(a) is explicitly predicated on the order's being held valid after a hearing. 3/

3/ The pertinent portions of the Court's analysis of the compensation provisions of the 1969 Coal Act are set forth as follows:

"Reading § 820(a) in its entirety, one sees that clause [1] concerns withdrawal orders issued under § 814(a) or (b); clause [2] concerns withdrawal orders which the inspector has certified, under § 814(c)(1), to be caused by "an unwarrantable failure of [the] operator to comply with . . . mandatory health or safety standards;" and clause [3] concerns situations in which the operator "violates or fails or refuses to comply with any order issued under" § 814. Compensation of idled miners varies with the three situations covered by the three clauses. Miners idled by § 814(a) and (b) withdrawal orders are entitled under clause [1] to compensation for the balance of the shift during which the withdrawal order was issued, and half of the next shift, if that shift also was idled. Where there has been a § 814(c)(1) certification, clause [2] provides the basis for giving the idled miners full compensation up to one week, but only after a hearing and after the withdrawal order has become "final." If the operator fails to comply with the withdrawal order, clause [3] gives the miners double compensation for the time during which they should have been idled, through the point at which the withdrawal order is "complied with, vacated, or terminated."

"We believe that it is clear that in drafting § 820(a) Congress understood the difference between an order which is ultimately upheld and one which is ultimately vacated, that in clause [2] Congress intended to compensate miners only where the order is ultimately upheld, but that in clauses [1] and [3] Congress intended to compensate miners even where the order is ultimately vacated. Any other reading of the section would be inconsistent

Bearing these principles in mined it must be concluded that the Applicant's prima facie case in the instant proceeding consists of three basic elements: First, the existence of the underlying 104(c)(1) notice of violation must be established. Second, it must be established that one or more of the 104(c)(1) orders was served on the operator or his agent, and that the condition or practice set forth in such order or orders constituted a violation of the cited mandatory safety standard caused by an unwarrantable failure on the Respondent's part to comply with such standard. See generally, Kentland-Elkhorn Coal Corporation, 4 IBMA 166, 82 I.D. 234, 1974-1975 OSHD par. 19,633 (1975). Finally, the Applicant must establish the amount of compensation due each miner idled by such order or orders of withdrawal.

In Zeigler Coal Company, 7 IBMA 280, 84 I.D. 127, 1977-1978, OSHD par. 21,676 (1977), the Interior Board of Mine Operations Appeals (Board) set forth the governing test for unwarrantable failure. The Board held that a violation of a mandatory standard is caused by an unwarrantable failure to comply with the standard where "the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care." 7 IBMA 295-296.

At the outset, it is found that the Applicant has made a prima facie showing of the existence of the underlying 104(c)(1) notice of violation. Each of the four subject orders makes reference to the notice. (Exhs. A-3, A-4, A-5, A-6). Furthermore, it is significant to note that Paragraph IX of the application for compensation, filed on January 24, 1977, alleged, in part, that "[n]o known Orders to date have modified or terminated Unwarrantable Failure Withdrawal Order Nos. 1 GRB, 2 GRB, 3 GRB or 4 GRB." Paragraph No. IX of the Respondent's answer, filed on April 4, 1977, states that "[t]he Respondent denies Paragraph IX and states that all orders and notices that were issued have been abated as of March 29, 1977." (Emphasis added). This statement in the Respondent's answer seems to imply that the underlying 104(c)(1) notice was issued, and, when read in conjunction with the statements contained in the subject orders, confirms a prima facie showing of its existence.

In view of the times for issuance of the four withdrawal orders, if any, one of the orders were found valid a basis for 1 week's compensation would be established.

Certain questions arise as to the validity of some of the orders, however, there is no question as to the adequacy of a prima facie case concerning the validity of Order No. 3 GRB, December 13, 1975, 30 C.F.R. § 1100-2(b).

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fn. 3 (continued)
with the section's overall design, since it would ignore the fact that clause [2] explicitly predicates compensation on the order's being held valid after a hearing, whereas clauses [1] and [3] have no such requirement. 520 F.2d at 719-720.

Accordingly, we will discuss that order.

Order No. 3 GRB, December 13, 1976, 30 C.F.R. § 1100-2(b), states that "[o]nly one (1) outlet valve was installed in the water line that [paralleled] the Nos. 1, 2 and 3 belt conveyors for a distance of about 1,650 feet and fittings suitable for connection was not provided at the one outlet valve. This condition was observed after a fire was extinguished at the No. 3 belt conveyor drive." (Exh. A-5). Mandatory safety standard 30 C.F.R. § 75.1100-2(b), provides as follows:

> (b) Belt conveyors. In all coal mines, waterlines shall be installed parallel to the entire length of belt conveyors and shall be equipped with firehose outlets with valves at 300-foot intervals along each belt conveyor and at tailpieces. At least 500 feet of firehose and fittings suitable for connection with each belt conveyor waterline system shall be stored at strategic locations along the belt conveyor. Waterlines may be installed in entries adjacent to the conveyor entry belt as long as the outlets project into the belt conveyor entry.

The waterline in question should have been equipped with outlets with valves at 300-foot intervals along each belt conveyor and at the tailpieces. However, the cited waterline was provided with only one outlet valve for a distance of approximately 1,650 feet. In light of the nature of the condition, the Respondent should have known of its existence. Accordingly, it is found that a violation of mandatory safety standard 30 C.F.R. § 75.1100-2(b), existed, and that such violation was caused by an unwarrantable failure on the Respondent's part to comply with the mandatory safety standard. The order of withdrawal was valid within the meaning of section 110(a) of the 1969 Coal Act.

In view of the foregoing, it is found that miners idled by the issuance of Order No. 3 GRB, December 13, 1976, 30 C.F.R. § 75.1100-2(b) are entitled to one week's compensation at their regular rate of pay under section 110(a) of the 1969 Coal. 4/ The idled miners and the amount of compensation to which each miner is entitled are identified as follows:

4/ It is found that the dates and hours the miners would have worked during the one week period following the issuance of the order are as set forth in the supplemental application for compensation as amended to conform with the proof. (See, Tr. 49-56 and references cited therein). These time periods are set forth for the individual miner-claimants as follows:

"(A) Keith McCoy, Water Cooper, Taby Cooley, Gregory Boggs, Jack Matney and Danny Mahon were idled from 9:45 a.m. until 3:00 p.m. on December 13, 1976, and for all of their shift on December 14, 15, 16, and 17, 1976, and from 7:00 a.m. until 9:45 a.m. on December 20, 1976.

"(B) George Tiller, Charles Stover, Larry Lester, William Workman, Orgille Napier, Kirby Cisco, Andrew Miller, Mearl Fields, Robert Fields, Philip Springer and Bobby Robinson were idled for all of the second shift on December 13, 14, 15, 16, and 17, 1976.

NAME	HOURLY WAGE	December, 1976						TOTAL
		13	14	15	16	17	20	
Keith McCoy	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Walter Cooper	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Taby Cooley	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Gregory Boggs	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Jack Matney	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Danny Mahon 5/	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
George Tiller	8.145	65.16	65.16	65.16	65.16	65.16		325.80
Charles Stover	8.145	65.16	65.16	65.16	65.16	65.16		325.80
Larry Lester	8.145	65.16	65.16	65.16	65.16	65.16		325.80
William Workman	8.145	65.16	65.16	65.16	65.16	65.16		325.80
Orville Napier	7.74	61.92	61.92	61.92	61.92	61.92		309.60
Kirby Cisco	7.74	61.92	61.92	61.92	61.92	61.92		309.60
Andrew Miller	7.74	61.92	61.92	61.92	61.92	61.92		309.60
Mearl Fields	8.145	65.16	65.16	65.16	65.16	65.16		325.80
Robert Fields	7.74	61.92	61.92	61.92	61.92	61.92		309.60

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fn. 4 (continued)

"(C) Frank Evans, Kyle Cline, Alvin Chapman and Kenneth Whited were idled from 9:45 a.m. until 3:00 p.m. on December 13, 1976, and for all of their shift on December 14, 15, 20, and 21, 1976, and from 7:00 a.m. until 9:45 a.m. on December 22, 1976.

"(D) Earl Hall was idled for all of the second shift on December 13, 14, 15, 60, and 21, 1976.

"(E) Willard Newsome and Tennis Canterbury were idled from 9:45 a.m. until 3:00 p.m. on December 13, 1976, and for all of the first shift on December 14, 15, 16 and 20, 1976, and from 7:00 a.m. to 9:45 a.m. on December 21, 1976.

"(F) Bruce Cooley was idled from 9:45 a.m. until 3:00 p.m. on December 13, 1976, and for all of the first shift on December 20, 21, 22, and 23, 1976, and from 7:00 a.m. until 9:45 a.m. on December 24, 1976.

"(G) Philip Jones was idled for the second shift on December 13, 20, 21, 22, and 23, 1976.

"(H) Isaac Bryant was idled for all of the first shift on December 14, 15, 16, 17, and 20, 1976."

5/ The May 16, 1977 answers to interrogatory Nos. 8 and 9 contain information as relates to all miner-claimants except Danny Mahon. The Respondent expressly admitted that Danny Mahon was a regular day shift miner at the No. 1 Mine. (Application for Compensation, paragraph XIII *filed* January 24, 1977, *and* Answer thereto *filed* April 4, 1977). Additionally, the Respondent is deemed to have admitted the averment that Mr. Mahon's hourly wage was 7.59 per hour, as set forth in the Supplemental Application for Compensation, due to the Respondent's failure to file an answer to said pleading denying the allegation. *See* 29 C.F.R. 2700.1(b), *reported at* 44 *Fed. Reg.* 38227 (1979), Rules 8(d) *and* 15(a), of the *Federal Rules of Civil Procedure*.

Phillip Springer	7.74	61.92	61.92	61.92	61.92	61.92		309.60
Bobby Robinson 6/	7.59	60.72	60.72	60.72	60.72	60.72		303.60
December		13	14	15	20	21	22	
Frank Evans	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Kyle Cline	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Alvin Chapamn	7.995	41.97	63.96	63.96	63.96	63.96	21.99	319.80
Kenneth Whited	8.145	42.76	65.16	65.16	65.16	65.16	22.40	325.80
Earl Hall	8.145	65.16	65.16	65.16	65.16	65.16		325.80
December		13	14	15	16	20	21	
Willard Newsome	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Tennis Canterbury	7.995	41.97	63.96	63.96	63.96	63.96	21.99	319.80
December		13	20	21	22	23	24	
Bruce Cooley	7.995	41.97	63.96	63.96	63.96	63.96	21.99	319.80
Phillip Jones	8.145	65.16	65.16	65.16	65.16	65.16		325.80
December		14	15	16	17	20		
Isaac Bryant	7.59	60.72	60.72	60.72	60.72	60.72		303.60

(See, Applicant's Interrogatories to Respondent, Nos. 8 and 9, filed February 18, 1977 and Applicant's Responses thereto, filed May 16, 1977).

Interest computed at the rate of 6 percent per annum will be awarded covering the periods from the dates of idlement, commencing December 14, 1976, to the date upon which the compensation is paid. Local Union 5869 v. Youngstown Mines, 1 FMSHRC 990, 1979 OSHD par. 23,803 (1979).

The Applicant seeks an award of costs and attorneys fees based upon the "Respondent's flagrant refusal to respond to the process and jurisdiction of this Court" (Applicant's Proposed Findings of Fact and Conclusions of Law, pg. 9). Section 110(b)(3) of the 1969 Coal Act expressly permits the successful applicant in a discrimination proceeding to recover reasonable costs and reasonable attorney's fees. Section 110(a) accords no such right to the successful applicant in a compensation case. Accordingly, the Applicant's request must be denied. Accord, Local Union 9856, District 15, United Mine Workers of America v. CF&I Steel Corporation, Docket No. DENV 73-111 (October 4, 1973).

6/ The May 16, 1977, answers to interrogatory Nos. 8 and 9 list Bobby Robinson's hourly wage as $7.74. Since the Applicant has sought one week's compensation for Mr. Robinson at the rate of 7.59 per hour, the award will be based on the hourly wage rate of $7.59.

V. Conclusions of Law

1. The parties have been subject to the provisions of the 1969 Coal Act and the 1977 Mine Act at all times relevant to this proceeding.

2. Under the Acts, the Administrative Law Judge has jurisdiction over the subject matter of and parties to this proceeding.

3. Order No. 3 GRB, December 13, 1976, 30 C.F.R. § 75.1100-2(b) is valid within the meaning of section 110(a) of the 1969 Coal Act. Such order remained in full force and effect until terminated in March, 1977, and the Respondent never sought administrative review of such order.

4. All oral determinations made at the hearing granting various motions are affirmed.

5. All of the conclusions of law set forth in Part IV of this decision are reaffirmed and incorporated herein.

VI. Proposed Findings of Fact and Conclusions of Law

The Applicant filed proposed findings of fact and conclusions of law. Such submission, insofar as it can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

ORDER

The Respondent is ORDERED to pay compensation to the individual miners as set forth below, with interest computed at the rate of 6 percent per annum for the period commencing on the day following the day each amount was due in December of 1976, and ending on the date when the compensation is paid:

NAME	HOURLY WAGE	December, 1976						TOTAL
		13	14	15	16	17	20	
Keith McCoy	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Walter Cooper	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Taby Cooley	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Gregory Boggs	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Jack Matney	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Danny Mahon	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
George Tiller	8.145	65.16	65.16	65.16	65.16	65.16		325.80
Charles Stover	8.145	65.16	65.16	65.16	65.16	65.16		325.80
Larry Lester	8.145	65.16	65.16	65.16	65.16	65.16		325.80
William Workman	8.145	65.16	65.16	65.16	65.16	65.16		325.80
Orville Napier	7.74	61.92	61.92	61.92	61.92	61.92		309.60

Kirby Cisco	7.74	61.92	61.92	61.92	61.92	61.92		309.60
Andrew Miller	7.74	61.92	61.92	61.92	61.92	61.92		309.60
Mearl Fields	8.145	65.16	65.16	65.16	65.16	65.16		325.80
Robert Fields	7.74	61.92	61.92	61.92	61.92	61.92		309.60
Phillip Springer	7.74	61.92	61.92	61.92	61.92	61.92		309.60
Bobby Robinson	7.59	60.72	60.72	60.72	60.72	60.72		303.60
December		13	14	15	20	21	22	
Frank Evans	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Kyle Cline	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Alvin Chapamn	7.995	41.97	63.96	63.96	63.96	63.96	21.99	319.80
Kenneth Whited	8.145	42.76	65.16	65.16	65.16	65.16	22.40	325.80
Earl Hall	8.145	65.16	65.16	65.16	65.16	65.16		325.80
December		13	14	15	16	20	21	
Willard Newsome	7.59	39.85	60.72	60.72	60.72	60.72	20.87	303.60
Tennis Canterbury	7.995	41.97	63.96	63.96	63.96	63.96	21.99	319.80
December		13	20	21	22	23	24	
Bruce Cooley	7.995	41.97	63.96	63.96	63.96	63.96	21.99	319.80
Phillip Jones	8.145	65.16	65.16	65.16	65.16	65.16		325.80
December		14	15	16	17	20		
Isaac Bryant	7.59	60.72	60.72	60.72	60.72	60.72		303.60

John F. Cook
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

FEB 26 1980

ITMANN COAL COMPANY, Contestant v.	Contest of Order Docket No. HOPE 79-307
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Order No. 0662348 February 26, 1979 Itmann No. 3 Mine
UNITED MINE WORKERS OF AMERICA, Respondent	

DECISION

Appearances: Karl T. Skrypak, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant;
Leo J. McGinn, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent MSHA;
Joyce A. Hanula, Legal Assistant, UMWA, Washington, D.C., for Respondent UMWA.

Before: Judge Stewart

On March 14, 1979, Itmann Coal Company filed for review of Order No. 0662348, dated February 26, 1979, pursuant to the provisions of section 105(d) of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act). MSHA and United Mine Workers of America (UMWA) subsequently filed answers admitting the issuance of the order but denying the other allegations set forth in the contest of order. The hearing in this matter was held on August 29, 1979, in Charleston, West Virginia. The parties chose to present oral argument at the conclusion of the hearing.

On February 23, 1979, inspector Claude R. Hall issued a section 104(a) citation to Contestant at its Itmann No. 3 Mine in the course of a safety and health inspection. The inspector alleged a violation of 30 CFR 75.1103-4(a) and described the condition or practice as follows: "The automatic fire sensor and warning device system was not provided with a device between the Nos. 2 and 2-1/2 Bee Tree Belts to identify a fire within each belt flight." Section 75.1103-4(a) requires that automatic fire sensor and warning device systems shall provide identication of fire within each belt unit operated by a belt drive. The sensor is a device approximately 5 inches long, 2 inches wide and 1-1/2 inches thick. Each device has a plug and a socket by which it is connected to the sensor line. A single sensor line extends for the entire length of the belt system. As noted on the citation, the inspector observed that only one such device had been provided for the Nos. 2 and 2-1/2 belts. He directed that the condition be abated by 8 a.m. on February 26, 1979.

On Friday, February 23, at quitting time, Cecil Farley, a maintenance foreman at the No. 3 Mine, was charged by Contestant's chief electrician with the responsibility for correcting the condition. He was to correct it during the Saturday shift. On Saturday morning, Mr. Farley gave a sensor to an electrician and instructed him to install the device in the fire sensor line at the belt drive of the No. 2-1/2 belt. Because he was unaware on Saturday that a plug and socket were not located in the sensor line at the intersection of the Nos. 2 and 2-1/2 belts, Mr. Farley did not mention the necessity of splicing a plug and socket into the sensor line. The electrician walked along the belt in an outby direction until he located a plug and socket approximately two crosscuts outby the No. 2-1/2 belt drive. He connected the sensor at that location.

Mr. Farley did not see the electrician again that Saturday. He did not question the electrician or examine his work. As a consequence, he did not learn of the misplacement until Monday morning when the electrician informed him that he had installed the sensor two crosscuts outby the drive. Mr. Farley thereupon notified Denny Smith, a belt foreman, that the box had been installed at the wrong location so that Mr. Smith could, in turn, notify the inspector.

The inspector returned to the affected area on Monday, February 26, 1979, and was informed by Mr. Smith, that the sensor had been installed at a point along the belt a number of crosscuts outby the intersection of the two belts. The inspector thereupon issued order of withdrawal No. 0662348, pursuant to section 104(b) [1] of the Act. He described the condition or practice which led to the order as follows: "Not enough effort has been made to install a device between Nos. 2 and 2-1/2 Bee Tree Belts on the sensor line to identify a fire within each belt flight." Order No. 0662348 was terminated 70 minutes later at 1:20 p.m., after the requisite device was installed between the Nos. 2 and 2-1/2 belts.

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[1] Section 104(b) of the Act reads as follows:

"If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (104(a)) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

In order to abate the condition, the operator cut a plug and socket from a roll of cable, cut the existing sensor line at the drive, spliced the plug and socket into the sensor line, plugged in the monitoring device at the drive, and unplugged the device located two crosscuts outby. The spool of sensor cable from which the plug and socket used to abate the condition were taken had been ordered on Friday, February 23. It arrived at the mine on Monday.

Darrel Worley, a miner operator at the No. 3 Mine, testified that the materials necessary to abate the condition were available elsewhere. He observed available materials 1 week before the issuance of the order. These materials were located in an adjacent and accessible, but technically separate mine--the No. 4 Mine. Mr. Worley testified that materials could be and were regularly obtained from the No. 4 Mine for use in the No. 3 Mine

Inspector Hall related a conversation that he had with Mr. Beard, one of Contestant's superintendents. The inspector quoted Mr. Beard as admitting that there were "plugs all over the mine." 2/ The inspector also testified that he was told by another of Contestant's superintendents that the necessary materials were available in the mine.

Section 104(b) of the Act requires that an inspector shall issue an order under that subsection when he finds that a violation described in a citation issued pursuant to section 104(a) has not been totally abated within the time specified and that the time for abatement should not be further extended. Contestant admitted, through counsel, that the 104(a) citation was properly issued. That is, the monitoring device was not located at the belt drive as required. Moreover, it was clearly established that the device had not been installed at the No. 2-1/2 belt drive on Monday when the inspector issued the subject order. Counsel for Contestant asserted the following at the hearing: "The only reason for this hearing is whether or not the circumstances justified the issuance of the (b) order, whether or not (Contestant) made a reasonable effort under the circumstances."

The test as to whether a 104(b) order was properly issued was enunciated by the Board of Mine Operations Appeals in United States Steel Corporation, 7 IBMA 109, 116 (1976). 3/ It was stated therein that "the inspector's

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2/ Throughout the transcript the term "plug" was used to refer to both sockets and plugs.

3/ The Board was addressing section 104(b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 *et seq*. (1970), which reads as follows:

"Except as provided in subsection (i) of this section, if, upon any inspection of a coal mine, an authorized representative of the Secretary determination to issue a section 104(b) order must be based on the facts confronting the inspector at the time he issued the subject withdrawal order regarding whether an additional abatement period should be allowed." The critical question is whether the inspector acted reasonably in failing to extend the time for abatement and in issuing the subject order.

At the outset, it must be noted that the violation was nonserious in nature. The No. 2 belt was 1,360 feet in length, while the No. 2-1/2 belt was 1,852 feet long, for a total of 3,212 feet. When the violation was first noted, the Nos. 2 and 2-1/2 belts were monitored by a single device. This device would have warned of a fire which occurred anywhere along these two belts, but would not have distinguished between the two belts.

The placement of the sensing device two crosscuts outby the belt drive would have warned of any fire which occurred along the No. 2-1/2 belt and 160 feet of the No.2 belt. The sensor located at the No. 2 belt drive would have warned of any fire occurring along the No. 2 belt except for the most inby 160 feet.

The length of time specified for abatement by the inspector was more than adequate. The inspector estimated that the length of time needed to install the device would be 20 minutes. Darrell Worley estimated that the installation should take 30 minutes. Seventy minutes actually elapsed between the issuance and termination of the order. As noted above, the inspector allotted almost 3 full days for abatement.

Contestant interposed the argument that the materials with which to abate the condition were ordered on Friday, but were not on hand until Monday. 4/

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fn. 3 (continued)
finds that there has been a violation of any mandatory health or safety standard but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation. If, upon the expiration of the period of time as originally fixed or subsequently extended, an authorized representative of the Secretary finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that the violation has been abated."

This section of the 1969 Act and section 104(b) of the 1977 Act are substantially similar with respect to the requirements each imposes on an inspector confronted with an operator's failure to abate a violation within the time specified.

4/ Parenthetically, Contestant's assertion that materials were not on hand to abate the condition is at odds with its assertion that the failure to

This argument is rejected. The testimony of the inspector and Mr. Worley established that plugs and sockets were available. Although the plug and socket which were used for abatement were taken from a fresh spool of sensor wire, they could have been obtained within the mine during the 3 days set for abatement. For instance, a suitable plug and socket were located on the sensor line two crosscuts outby the No. 2-1/2 belt drive, at the point where the electrician connected the monitoring device on Saturday. Other plugs and sockets were located on the sensor line at intervals of 250 feet.

Contestant also maintained that reasonable efforts had been made to abate the condition prior to the issuance of the order--a superintendent ordered Mr. Farley to correct the situation and Mr. Farley had, in turn, directed an electrician to place a sensor at the No. 2-1/2 belt drive. The inference that these actions absolved Contestant of fault in the failure to abate is rejected. Blame for the failure cannot be laid entirely to the electrician. Mr. Farley did not know that the sensor line did not contain a socket and plug at the belt drive, and he could not, therefore, fully inform the electrician of the actions necessary for abatement. In addition, he did not question the electrician or examine his work afterwards. In sum, mine management did not adequately supervise the electrician's efforts. Applicant did not demonstrate that it made reasonable efforts to abate the condition prior to the issuance of the order.

Despite the fact that the condition was nonserious and rendered even less serious by Contestant's abatement efforts, the inspector reasonably exercised his authority in refusing to extend the time specified for abatement. The abatement effort requested by the inspector was appropriate and the time specified for abatement was ample. Although an extension of time might be appropriate when mine management through no fault of its own is unable to abate a condition within the time as originally set or extended, an extension in this instance would have amounted to condonation of Contestant's inadequate abatement efforts.

The facts with which the inspector was confronted on February 26, 1979, did not warrant an extension of time for abatement. The issuance of Order No. 662348 was, therefore, entirely proper.

ORDER

It is ORDERED that the above-captioned contest of order is hereby DISMISSED.

Forrest E Stewart

Forrest E. Stewart
Administrative Law Judge

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fn. 4 (continued)
abate was the fault of a non-management employee rather than management. Contestant is asserting on the one hand that it was aware of a lack of materials necessary for abatement and, on the other hand, that management absolved itself by ordering an electrician to abate the condition on Saturday morning, but that he failed to abate the condition as ordered.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FEB 26 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	Civil Penalty Proceedings
	Docket No. HOPE 79-128-P A/O No. 46-03773-03003V
v.	
	Docket No. HOPE 79-129-P A/O No. 46-03773-03004V
AMHERST COAL COMPANY, Respondent	
	MacGregor No. 8 Mine

DECISION

Appearances: Inga A. Watkins, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
Edward I. Eiland, Esq., Eiland & Bennett, Logan, West Virginia, for Respondent.

Before: Judge Cook

I. Procedural Background

On November 22, 1978, the Mine Safety and Health Administration (Petitioner) filed petitions for assessment of civil penalty in the above-captioned proceedings pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (1978) (1977 Mine Act). The petitions collectively allege two violations of provisions of the Code of Federal Regulations. Answers were filed by Amherst Coal Company (Respondent) on December 12, 1978.

A notice of hearing was issued on June 5, 1979, scheduling the cases for hearing on the merits on July 19, 1979, in Beckley, West Virginia. The hearing was held as scheduled with representatives of both parties present and participating.

A schedule for the submission of posthearing briefs and proposed findings of fact and conclusions of law was agreed upon after the presentation of the evidence. The briefing schedule was subsequently revised at the Petitioner's request. Under the revised schedule, posthearing briefs and proposed findings of fact and conclusions of law were due on September 28, 1979. Reply briefs were due by October 12, 1979. The Petitioner's brief was filed on September 28, 1979. The Respondent did not file a brief.

II. Violations Charged

A. Docket No. HOPE 79-128-P

Citation No.	Date	30 CFR Standard
29736	4/4/78	75.1725

B. Docket No. HOPE 79-129-P

Order No.	Date	30 CFR Standard
29738	4/4/78	75.1725

III. Evidence Contained in the Record

A. Stipulations

The parties entered into various stipulations which are set forth in the findings of fact, *infra*.

B. Witnesses

The Petitioner called as its witness Henry J. Keith, a Mine Safety and Health Administration (MSHA) inspector.

The Respondent called as its witnesses Ernest Marcum, company safety inspector for the Respondent; Shirley Adkins, a miner whose duties included the repair and inspection of electrical equipment at the subject mine in April 1978; Virgil Damron, chief electrician at the subject mine; Edward L. Chafin, a miner at the subject mine serving as chairman of the mine safety committee for his local union; and Charles Rhodes, a section foreman at the subject mine.

C. Exhibits

1. The Petitioner introduced the following exhibits in evidence:

M-1 is a copy of Citation No. 29736, April 4, 1978, 30 CFR 75.1725 and a copy of the termination thereof.

M-2 is a two-page document containing photographs of a scoop.

M-3-A is a copy of Order No. 29738, April 4, 1978, 30 CFR 75.1725 and a copy of the termination thereof.

M-3-B is a copy of a modification of M-3-A.

M-4 is a diagram of a coal drill.

M-5 is a computer printout compiled by the Directorate of Assessments listing the history of previous violations for which the Respondent had paid assessments beginning April 4, 1975, and ending April 4, 1978.

2. The Respondent introduced the following exhibits in evidence: 1/

O-1 through O-8 are photographs of the subject scoop.

O-9 through O-15 are photographs of the subject coal drill. 2/

O-17 is a document styled "Examination of Electrical Equipment."

IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the 1977 Mine Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations, (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

During the course of the hearing, the parties entered into the following stipulations:

1. The Amherst Coal Company is the owner and operator of the MacGregor No. 8 Mine and, as such, is subject to the jurisdiction of the 1977 Mine Act (Tr. 5, 8, 9).

2. The copies of the subject citation, order, termination and the modification of the order were properly served on Amherst Coal Company (Tr. 5, 8).

1/ Exhibit O-16, a schematic diagram of the controls of the scoop, was withdrawn by the Respondent (Tr. 365).

2/ Exhibit O-11, a photograph of a coal drill, was not received from the reporter when the exhibits received at the hearing were forwarded with the transcript in this case. The attorney for the Respondent, who had introduced the exhibit, in a letter dated February 11, 1980, stated that he was willing to have the case decided in the absence of Exhibit O-11. The attorney for the Petitioner made a similar statement in a letter dated February 19, 1980.

3. Henry J. Keith is a duly authorized representative of the Secretary of Labor and was so during April, 1978 (Tr. 5, 8).

4. Amherst Coal Company exhibited good faith in attempting to rapidly abate the subject citation and order (Tr. 5, 8).

5. Amherst Coal Company is a large company (Tr. 5, 8).

6. The proposed penalty will not affect Amherst Coal Company's ability to continue in business (Tr. 5, 8, 9).

7. Amherst Coal Company's total tonnage during 1978 at all mines was 1,377,448 tons of coal (Tr. 9).

B. Opinion and Findings of Fact

1. Docket No. HOPE 79-128-P: Citation No. 29736, April 4, 1978, 30 CFR 75.1725

Occurrence of Violation

MSHA inspector Henry J. Keith arrived at the Respondent's MacGregor No. 8 Mine at approximately 8 a.m. on April 4, 1978, to conduct a spot inspection (Tr. 19). Mr. Ernest Marcum, the Respondent's safety inspector, accompanied Inspector Keith during the inspection (Tr. 20). At approximately 10:45 a.m., the subject citation was issued alleging a violation of mandatory safety standard 30 CFR 75.1725 in that the S & S scoop located in the 001 section:

> [W]as not maintained in a safe operating condition in that the emergency switch on the control box was frozen and inoperative. The power lead to the battery was damaged with exposed wire. The inner parts of the rear light was missing with wire leads exposed. Exposed moving universal was not guarded, no fender over left drive wheel to protect persons from injury.

(Exh. M-1).

Mandatory safety standard 30 CFR 75.1725 provides, in part, that: "(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

The inspector's testimony is in accord with the statements contained in the citation. His testimony establishes the existence of the four cited defects on the S & S scoop and also establishes that the defects rendered the machine unsafe within the meaning of the subject regulation (Tr. 22-26, 28-39, 73, 75-76, 79, 84-86, 91, 241-242). Additionally, the inspector observed the machine in operation (Tr. 22, 71, 92-96).

The testimony of Inspector Keith is at variance with the testimony of the Respondent's witnesses on two key points: (1) the condition of the emergency switch, and (2) the condition of the power lead to the battery.

Messrs. Marcum and Chafin testified that the disconnect switch on the scoop was frozen and inoperative (Tr. 108-109, 195). The testimony of both witnesses collectively asserts that both the panic bar and the emergency switch were properly functioning (Tr. 129, 195).

The inspector testified that the power lead mentioned in the citation connected the battery to the power circuits (Tr. 76). According to the inspector, the power lead extended above the surface of the frame of the scoop on the operator's side. Some of the insulation had been torn off exposing the cable's metal wires (Tr. 31-32, 76-77).

Messrs. Marcum and Chafin disagreed, testifying that the exposed cable was inside the metal bell, or plug, which served to attach the cable to the battery. According to both witnesses, it was necessary to depress the cable and peer inside the bell in order to see the exposed cable (Tr. 113, 194, 204). Both witnesses testified that they did not see any exposed cable outside the bell (Tr. 113, 194) and indicated that Inspector Keith depressed the cable in order to see the exposed wire (Tr. 133, 204). However, the inspector testified that he did not have to depress the cable and peer under the bell in order to see bare wire (Tr. 79).

Numerous inconsistencies in the evidence presented by the Respondent serve to impeach the credibility of the Respondent's witnesses in those areas in which their testimony is at stark variance with the testimony of Inspector Keith. These inconsistencies cast a cloud over their testimony in all such areas depriving it of probative value. The major areas are set forth below.

First, Mr. Marcum, the company safety inspector, and Mr. Damron, the chief electrician, disagreed as to the identity of the disconnect switch on Exhibits O-6 and O-7 (Tr. 110-111, 172-173). Second, an inconsistency is present in the testimony of Mr. Marcum and Mr. Chafin as relates to the exposed universal. According to Mr. Marcum, the inspector issued this portion of the citation to obtain guarding on a rounded disc located near the universal, not to obtain a covering for the universal itself (Tr. 115, 138). However, Mr. Chafin indicated that this portion of the citation was issued because both the disc and the universal were uncovered (Tr. 208). Third, the conduct of Mr. Marcum at the time the citation was issued is inconsistent with his testimony on a crucial point. According to Mr. Marcum, the panic bar and emergency switch were in working order. He testified that Inspector Keith indicated that he was issuing the citation for the frozen disconnect switch (Tr. 129-130). However, the citation served to Mr. Marcum clearly states that "the emergency switch on the control box was frozen and inoperative" (Exh. M-1). (Emphasis added.) There is no indication that Mr. Marcum mentioned this to the inspector at the time and, in fact, he testified that he expected the inspector to give testimony at the hearing concerning the disconnect switch, not the emergency switch (Tr. 129). In view of the clear statement contained in the citation, I find it highly improbable that Mr. Marcum would not have sought a clarification from the inspector at the time as to why the emergency switch was cited when the alleged conversation at the machine clearly indicated that another switch was being cited. Additionally, Mr. Damron testified during cross-examination that the emergency switch was repaired on April 4, 1978, subsequent to the inspection (Tr. 180-181). However, he retracted this testimony during redirect examination (Tr. 182-183).

Although Messrs. Marcum, Damron, and Chafin all claimed that the panic bar and emergency switch worked properly there was considerable inconsistency in their testimony as to (1) whether the panic bar was checked at all, (2) who checked it, (3) who was present, and (4) whether the power was turned on when it was checked.

On the first and second points Mr. Chafin said first that he checked the panic bar with no power on (Tr. 195), then later he said that no request was made for a test of the panic bar and he saw no one test it (Tr. 218). However, Mr. Marcum said the inspector tested it (Tr. 146). On the other hand, Mr. Damron said that he himself tested it (Tr. 174).

On the third point, Mr. Marcum and Mr. Chafin said Virgil Damron came to the scoop and told the inspector that the frozen switch was a disconnect switch (Tr. 129, 195). However, Mr. Damron, the chief electrician, said that he did not know where the inspector was when he tested the panic bar. He said that the inspector could have been there but he had no idea who was there and that he did not know if the inspector was present (Tr. 184-186). The inspector had stated that he did not see an electrician at the time of the scoop inspection (Tr. 75, 237, 250-251).

As to the fourth point, Mr. Marcum and Mr. Chafin said no power had been used on the scoop during the test of the panic bar (Tr. 146, 195). However, Mr. Damron said he tested the panic bar and emergency switch with the power on (Tr. 174).

Accordingly, I conclude that the conditions set forth in the citation existed as alleged and rendered the S & S scoop unsafe within the meaning of the regulation. A violation of 30 CFR 75.1725 has been established by a preponderance of the evidence.

Gravity of the Violation

The MacGregor No. 8 Mine was wet and muddy and possessed an irregular bottom contour (Tr. 21). Float coal dust was suspended in the air due to dry drilling being performed with a coal drill in the nearby face (Tr. 30). The miners working in the area had wet hands and clothing (Tr. 32). Sparks were observed emanating from the broken rear light while the machine was in operation (Tr. 22, 33-34). The condition of the rear light and the condition of the battery cable could have resulted in miners sustaining electrical burns or electrical shocks and, due to the float coal dust, could have resulted in a mine fire or explosion (Tr. 23, 30-35, 177-178, 181-182). Four miners were exposed to the former hazard while eight to nine miners were exposed to the latter hazard (Tr. 33, 35).

The inspector testified that the inoperative emergency switch exposed the machine operator and miners working in the vicinity of the machine to injuries ranging from lacerations to a fatality and that the wet and muddy conditions and irregular bottom contour could contribute to an occurrence (Tr. 25-29). However, it is significant to note that the machine was equipped with a footbrake (Tr. 74). Four or five miners were exposed to this hazard.

The inspector testified that it is customary in the mining industry for miners to transport rock dust, half headers, wedges, bolts, and bolt plates on the frames of scoops (Tr. 24, 36-37). He testified that materials of this type were observed on the body of the subject scoop on April 4, 1978 (Tr. 83, 97). According to the inspector, an object could fall against the universal during the operation of the scoop and become a flying projectile. This could result in the loss of an eye or other serious injury. Four miners were exposed to the hazard (Tr. 23-24, 35-36).

The inspector testified that the absence of a fender over the left rear wheel made it possible for a miner to maneuver his body between the wheel and the frame in order to connect the cable to the battery. A similar condition had resulted in a fatality at another mine (Tr. 24, 84-86).

Based on the foregoing, I conclude that the violation was very serious.

Negligence of the Operator

The cited conditions were readily observable and should have been detected by the section foreman (Tr. 52-60). Accordingly, I conclude that the Respondent demonstrated ordinary negligence.

Good Faith in Attempting Rapid Abatement

The parties stipulated that the Respondent exhibited good faith in attempting rapid abatement (Tr. 5).

2. Docket No. HOPE 79-129-P: Order No. 29738, April 4, 1978, 30 CFR 75.1725

Occurrence of Violation

The subject order of withdrawal was issued by Inspector Keith during the course of his April 4, 1978, spot inspection of the Respondent's MacGregor No. 8 Mine (Tr. 259). The citation alleges, in pertinent part, that the coal drill in the 001 section "was not maintained in a safe operating condition in that * * * the stop and start switch was damaged and not connected to the deenergizing device. The coal drill could not be deenergized quickly in the event of an emergency" (Exh. M-3-A), in violation of mandatory safety standard 30 CFR 75.1725. The coal drill was in operation at the time (Tr. 269-270, 298).

The testimony of the inspector differs radically from the testimony of the Respondent's witnesses as relates to the condition of the coal drill on the date in question. According to the inspector, the butterfly-type stop and start switch was damaged in such a manner that a piece of wire, extending from the top part of the switch to the leg of the coal drill's canopy, was being used to hold the switch in the "on" position (Tr. 261, 275, 294-295). Additionally, he testified that the deenergizing device, or panic bar, was supposed to be connected to the stop and start switch, but that it was not so connected (Tr. 262, 275, 277). According to the inspector, a bolt used to hold the panic bar in line down the side of the machine was missing, thus causing the end of the bar to drop (Tr. 289, 296). Accordingly, the end of the bar was lowered beyond the point where it made the connection with the start and stop switch (Tr. 351-352).

The Respondent's witnesses contradicted the inspector on both points. Mr. Marcum testified that he did not observe any wire around the panic bar (Tr. 315), and Mr. Chafin testified that the sole function of the wire observed by the inspector was to operate the light switch. Mr. Chafin also testified that wire was not used on the panic bar (Tr. 334-335). However, it is significant to note that the inspector's testimony addressed the presence of wire around the stop and start switch and not on the panic bar.

According to Messrs. Marcum and Damron, the panic bar was connected to the switch by an assembly consisting of a rod, a swivel sleeve and a spring. The rod was attached to the panic bar proper and the swivel sleeve was attached so as to operate the switch. The spring was located inside the swivel sleeve. The end of the rod was inserted into one end of the swivel sleeve and rested against the spring when the assembly was properly connected (Tr. 304-307, 329-330).

Messrs. Marcum and Chafin indicated that the panic bar had been rendered inoperative by the actions of Inspector Keith. According to Mr. Marcum, the inspector raised the panic bar causing the assembly to come apart. The swivel sleeve dropped and the spring fell out onto the deck of the machine. According to Mr. Marcum, the inspector thereupon indicated that the panic bar was not functioning adequately. Mr. Marcum also testified that Inspector Keith proceeded to replace the spring inside the sleeve and replace the panic bar in its proper position (Tr. 299, 308). This account was in accord with the testimony of Mr. Chafin (Tr. 333-334, 339).

Inspector Keith refuted this testimony. He testified that he did not touch or raise the bar in any manner because the defect was readily visible (Tr. 351). He testified that the spring and bar were already out when he commenced his inspection of the machine and that he did not repair it in any manner (Tr. 351). Additionally, he testified that he did not observe wire attached to the light switch (Tr. 352).

I am unable to accord probative value to the testimony of the Respondent's witnesses insofar as it conflicts with the testimony of Inspector Keith. Some of Respondent's witnesses were not in a position to know exactly what the inspector first observed as to the condition of the panic bar. The witness who appears to have been in the best position to see showed a marked inconsistency in his testimony as to what actually happened. At one point his testimony actually substantiated the position of the inspector. An example of inconsistency in testimony is found in the following statements of Mr. Marcum during cross-examination wherein he momentarily admitted that the rod, swivel sleeve and spring assembly was apart when the inspector arrived:

> Q. Didn't you state it by pulling it up in an upward motion that that would render it inoperative, and at that time the spring fell out?
>
> A. Yes, ma'am.
>
> Q. And you are not saying that by doing that Mr. Keith broke it?
>
> A. It wasn't together in the first place.
>
> Q. So the spring was not there prior to Mr. -- it was not intact with the entire panic bar and stop-start switch prior to the inspection; is that correct?
>
> A. Yes -- no. It was there, because it fell out when he pulled it up.
>
> Q. I said "intact," sir.
>
> A. No, ma'am. It was not intact, no.

(Tr. 312).

Additionally, the credibility of the Respondent's witnesses is further weakened by the assertion that the inspector proceeded to repair the panic bar assembly. I find it inconceivable that a federal mine inspector would engage in such conduct instead of confining his activities to identifying violations of mandatory standards and ordering their abatement (Tr. 351).

Based on the foregoing, I conclude that the conditions cited by the inspector existed as alleged and that the conditions constituted a violation of 30 CFR 75.1725.

Gravity of the Violation

The cited conditions would have prevented the machine operator from stopping the machine quickly should it have become necessary to do so (Tr. 262-263). Anticipated injuries to persons outside the machine ranged from severe lacerations to death (Tr. 263-264, 266). An occurrence was classified as probable (Tr. 264).

Accordingly, I conclude that the violation was very serious.

Negligence of the Operator

The inspector testified that the missing bolt could have been removed by someone or could have simply fallen out during the shift due to machine vibration (Tr. 290). However, the conditions were readily visible (Tr. 265-266) and Mr. Charles Rhodes, the section foreman, was in the area (Tr. 223-224). Under these circumstances, the Respondent should have known of the conditions.

Accordingly, I conclude that the Respondent demonstrated ordinary negligence.

Good Faith in Attempting Rapid Abatement

The parties stipulated that the Respondent exhibited good faith in attempting rapid abatement (Tr. 5).

History of Previous Violations

The history of previous violations at the Respondent's mines for which the Respondent had paid assessments between April 4, 1975, and April 4, 1978, is summarized as follows:

30 CFR Standard	Totals
All sections	1,961
75.1725	23

(Exh. M-5). (Note: All figures are approximations).

Size of the Operator's Business

The parties stipulated that Amherst Coal Company is a large company (Tr. 5), and that Amherst Coal Company's total tonnage for 1978 at all mines was 1,377,448 tons of coal (Tr. 9).

Effect on Operator's Ability to Continue in Business

The parties stipulated that the proposed penalty will not affect Amherst Coal Company's ability to continue in business (Tr. 5).

VI. Conclusions of Law

1. Amherst Coal Company and its MacGregor No. 8 Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to these proceedings.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of and the parties to these proceedings.

3. MSHA inspector Henry J. Keith was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of the citation and order of withdrawal which are the subject matter of these proceedings.

4. The violations charged in the subject citation and order of withdrawal are found to have occurred as alleged.

5. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

The Petitioner filed a posthearing brief, the Respondent did not. Such brief, insofar as it can be considered to have contained proposed findings and conclusions, has been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in these cases.

VIII. Penalty Assessment

Upon consideration of the entire record in these cases and the foregoing findings of fact and conclusions of law, I find that the assessment of penalties is warranted as follows:

A. Docket No. HOPE 79-128-P

Citation No.	Date	30 CFR Standard	Penalty
29736	4/4/78	75.1725	$1,000

B. Docket No. HOPE 79-129-P

Order No.	Date	30 CFR Standard	Penalty
29738	4/4/78	75.1725	$1,000

ORDER

Respondent is ORDERED to pay the civil penalties in the amount of $2,000 assessed in these proceedings within 30 days of the date of this decision.

John F. Cook

John F. Cook
Administrative Law Judge

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Administrator for Coal Mine Safety and Health, U.S. Department of Labor

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 28 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. PENN 79-113 A.C. No. 36-00965-030411
v.	:	Westland Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; William H. Dickey, Jr., Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), to assess a civil penalty against Consolidation Coal Company (hereinafter Consol) for violation of a mandatory safety standard. The petition alleges a violation of 30 C.F.R. § 75.1725(a), failure to immediately remove from service machinery or equipment in an unsafe condition. A hearing was held in

Pittsburgh, Pennsylvania, on January 23, 1980. Joseph F. Reid testified on behalf of MSHA. Richard Checca, Hugh Briggs, John Poskon, and David Cole testified on behalf of Consol. Both parties waived their rights to file briefs, proposed findings of fact, and conclusions of law. Instead, they made oral arguments at the conclusion of the taking of testimony.

The matter involves the alleged violation of 30 C.F.R. § 75.1725(a), failure to immediately remove from service machinery or equipment in an unsafe condition on October 3, 1978, at the Westland Mine loading ramp. This incident resulted in a miner suffering a disabling injury when he was squeezed between a moving mine car and a stationary shuttle car. Consol contends that it was engaged in "troubleshooting" at the time and did not violate the regulation.

ISSUES

Whether Consol violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalty which should be assessed.

APPLICABLE LAW

30 C.F.R. § 75.1725(a) provides as follows: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

STIPULATIONS

The parties stipulated the following:

1. The Westland Mine is owned and operated by respondent, Consolidation Coal Company.

2. The Westland Mine was subject to the jurisdiction of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 _et_ _seq_. (Coal Act) and is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, Pub. L. 91-173, _as_ _amended_ _by_ Pub. L. 95-164 (Act).

3. The Administrative Law Judge has jurisdiction over this proceeding pursuant to section 109 of the Coal Act and section 301 of the 1977 Act.

4. The subject notice and any modification, extensions and terminations thereof, were properly served by a duly authorized representative of the Secretary of Labor upon an agent of respondent at the dates, times and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any statements asserted therein.

5. The assessment of a civil penalty in this proceeding will not affect the respondent's ability to continue in business.

6. The appropriateness of the penalty, if any, to the size of the coal operator's business should be determined based on the fact that in 1978 the Westland Mine had an annual tonnage of 68,768 and the controlling company, Consolidation Coal Company, had an annual tonnage in excess of 10 million tons.

7. The alleged violation was abated in a timely fashion and the operator demonstrated good faith in attaining abatement.

8. An accident occurred on October 3, 1978, involving one man, John Corey, who suffered a disabling injury.

SUMMARY OF THE EVIDENCE

The undisputed evidence shows that a serious accident occurred at Consol's Westland Mine on October 3, 1978. John A. Corey, a miner, sustained a disabling injury in that accident. No representative of MSHA was present at the time of the accident.

The testimony of the eyewitnesses to the accident, who testified on behalf of Consol, established that on October 3, 1978, at approximately 6:15 a.m., section foreman Hugh Briggs was notified that the car spotter was not operating. The car spotter is a device which moves mine cars in the loading ramp area so that coal is evenly loaded from shuttle cars into mine cars. Mr. Briggs examined the car spotter and confirmed the fact that it was not operable. A mechanic, Richard Checca, was dispatched to the loading ramp area. After he was unable to activate the car spotter switch, he crossed the tracks to the car spotter tank and opened it. The car spotter tank contained the electrical panel and controls for the car spotter switch. At all times, mechanic Checca was accompanied by foreman Briggs.

At this time, in addition to foreman Briggs and mechanic Checca, the following miners were present: John Corey, a roof bolter helper; John Poskon, a roof bolter; and David Cole, a miner helper. There were several mine cars on the tracks. Two shuttle cars were loaded and placed one behind the other or "piggy-back" on the opposite side of the tracks from the car spotter tank.

Mechanic Checca spent 5 to 10 minutes "troubleshooting." He was unable to identify the problem. However, when he used a wooden wedge to manually lift the armature or contactor inside the car spotter tank, the mine cars moved forward on the tracks. During this entire period, foreman Briggs remained at his side but issued no orders to withdraw equipment or men. In fact, foreman Briggs testified that he did not know the whereabouts of any of the three other members of his crew who were in this area. Mechanic Checca testified that he manually lifted the armature three to five times. As the cars moved, the conveyor belt of the shuttle car was activated and coal was loaded in the mine car. John Poskon testified that when he observed the mine cars move, he activated the shuttle cars' conveyor belts to load coal into the mine cars. He did this so that the mine cars would not be as likely to derail as they would if they were half full. No one told him to activate the loading apparatus. Mechanic Checca saw the mine car fill up and he testified as follows:

> I noticed it was--it was going to dump the coal all over the tracks and pile everything up, so I just run the spotter and tried to get it through so it wouldn't cause a big pile of coal, you know, that everything would--well, whatever it did; but I tried to run the car through as far as I could to get the coal in the other car. That's when I guess Corey noticed that the--no one was operating the buggy, and he went across.

(Tr. 49).

Foreman Briggs testified that he was "surprised" when the conveyor on the shuttle car was activated and it began to dump coal into the mine car. David Cole, a miner helper, testified that at the time the cars moved and coal began to be loaded, he was standing next to John Corey on the same side of the tracks as were foreman Briggs and mechanic Checca but on the opposite side of the tracks from the shuttle cars and John Poskon. As coal from the shuttle cars began to spill out of the mine car, David Cole testified that "everyone started to yell." Someone yelled to shut off the shuttle car. No one saw John Corey cross the tracks. All of the witnesses assumed that John Corey ran across the tracks to shut off the shuttle car. At that point, everyone heard John Corey yelling and he was found to be squeezed between the mine car and the shuttle car. The shuttle car was moved and the victim was removed.

On October 3, 1978, at about 7:30 a.m., MSHA inspector Joseph F. Reid was conducting a regular inspection of the Westland Mine when he was informed by Consol management of the occurrence of a serious accident. At about 9 a.m., he arrived on the section where the accident occurred. Two Consol employees told him what happened. None of the parties involved in the accident was present. He found no violations evident at that time. He did not issue a citation. He returned to his regular inspection.

On October 11, 1978, the president of the local United Mine Workers of America submitted a written request to MSHA to investigate the instant accident. Inspector Reid was assigned this investigation. During the next 5 days, he made two trips to the mine and obtained statements from John Poskon, Hugh Briggs, and Richard Checca. Inspector Reid testified that he was told that a wooden wedge was used to "block out" the contactors causing the car spotter to operate continuously. As noted, supra, witnesses Poskon, Briggs, and Checca deny making any such statement. He wrote a citation for a violation of 30 C.F.R. § 75.1725(a) for failure to remove unsafe equipment from service. He also issued a "safeguard" to the victim, John Corey, for not seeking refuge in a manhole or shelter while there was moving traffic on the track. To abate the violation, management met with the miners concerning reinstruction on removing unsafe equipment from service. Marshall Hunt, Consol's assistant superintendent, gave Inspector Reid a copy of Consol's report of its investigation of the accident (Exh. G-4).

In a Consol memorandum dated October 3, 1978, from Stanley R. Kretoski, Sr., to Joseph Kristoff, Jr., the facts of the accident in question are set forth. The memo concludes, in pertinent part, as follows:

> Those of you who have been around for a few years are aware that this is not the first time this kind of accident has happened in our mines, and there will be others if safe haulage practices are not adhered to. With this thought in mind, the following recommendations are made:
>
> 1. Absolutely no one is to cross between moving mine cars.
> 2. When trips are being changed or maintenance work is being performed on the car spotter, shuttle cars are to be kept at least 8' away from the mine cars.
> 3. Only those people whose work duties require their presence at the ramp area shall be there.
> 4. The practice of "piggy-backing" is to stop unless both shuttle cars are attended.

(Exh. G-4).

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, and arguments of counsel have been considered. The evidence shows that on October 3, 1978, the car spotter in the loading ramp area of 10 East Section of Consol's Westland Mine was not operable. Although the car spotter was not in safe operating condition, it was not removed from service. At that time, foreman Briggs was present and he permitted "troubleshooting," involving the movement of mine cars, to proceed without taking any precaution to avoid injury to miners. Moreover, after the mine cars started to move, he took no action to prevent or stop the loading of coal while "troubleshooting" was being performed by the mechanic. I find this conduct to be a violation of 30 C.F.R. § 75.1725(a) as charged by MSHA.

Section 110(i) of the Act provides in pertinent part as follows:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Consol's prior history shows 490 violations at the Westland Mine in the 2 years prior to the instant violation. Of that number, only one violation was of regulation 30 C.F.R. § 75.1725(a) in controversy here.

Consol is a large operator. The assessment of a civil penalty will not affect its ability to continue in business.

Consol was negligent in failing to remove from service the car spotter which it knew was defective and unsafe. It was also negligent in permitting normal loading of mine cars while its mechanic was "troubleshooting." Moreover, by Consol's own admission, it had actual knowledge of the prior occurrence of "this kind of accident" but failed to produce any evidence of a safety program to prevent the instant accident. Under these circumstances, Consol is chargeable with a high degree of negligence.

In determining the gravity of this violation, consideration must include the following: (1) the likelihood of injury; (2) the number of workers exposed to the potential injury; and (3) the severity of potential injuries. In this case, the facts show that mining cars were moving on the tracks at irregular intervals without warning. Foreman Briggs testified that he did not know the whereabouts of three members of his crew at the time the car spotter was manually activated. Under these conditions, death or serious physical injury could be expected to result. In fact, victim John Corey sustained a disabling injury. I conclude that the violation was severe.

After notification of the violation, Consol discussed the hazards of this accident with its employees at the mine. Consol demonstrated good faith to achieve rapid compliance.

In conclusion, the evidence establishes a violation of 30 C.F.R. § 75.1725(a) in that the car spotter was neither in safe operating condition nor was it removed from service. An accident involving serious physical injury resulted because mine cars were being loaded with coal during the time that the car spotter was defective. The accident could have been prevented by the exercise of the degree of care mandated by the Act and regulations. The operator's negligence was of a high degree and the gravity was severe. Based upon all of the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty of $7,500 should be imposed for the violation which was found to have occurred.

ORDER

Therefore, IT IS ORDERED that respondent pay the sum of $7,500 within 30 days of the date of this decision as a civil penalty for the violation of 30 C.F.R. § 75.1725(a).

James A. Laurenson

James A. Laurenson, Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

DECEMBER 1980
Volume 2
No. 12

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Secretary of Labor, MSHA v. Phillips Uranium Corporation, CENT 80-208-M; (Judge Boltz, October 27, 1980)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 2, 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

CF&I STEEL CORPORATION

Docket No. DENV 76-46

IBMA No. 77-10

DECISION

This proceeding was initiated when CF&I Steel Corporation filed an application for review of an order of withdrawal issued on December 5, 1975, pursuant to section 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969. [1] The administrative law judge granted CF&I's application for review and vacated the order, on the ground that the Mining Enforcement and Safety Administration (MESA) failed to prove that there had been no intervening "clean" inspection of the entire mine, within the meaning of section 104(c)(2). MESA appealed. 2/ We affirm the judge.

---

[1] Section 104(c) of the 1969 Coal Act provided:

> (1) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any notice given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such notice, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also cuased by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
>
> (2) If a withdrawal order with respect to any area in a mine has been issued pursuant to paragraph (1) of this subsection, a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) of this subsection *until such time as an inspector of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations,* the provisions of paragraph (1) of this subsection shall again be applicable to that mine. [Emphasis added.]

The withdrawal order alleged, inter alia, that a section 104(c)(1) withdrawal order had been issued on August 6, 1975, and that no inspection of the entire mine had been made since August 6, 1975 which disclosed no similar violation. The judge found that MESA had conducted two complete regular quarterly inspections of this mine between (1) July 25, 1975 and September 25, 1975 (this inspection took 23 days--19 of which were after the section 104(c)(1) order of August 6, 1975); and (2) October 2, 1975 to December 16, 1975 (this inspection took 15 days--11 of which were prior to the section 104(c)(2) order of December 5, 1975). Of the 38 inspection days required to complete both inspections, 30 were in the period between August 6 and December 5, 1975. The MESA inspector testified that he did not know whether a complete mine inspection had occurred during those 30 inspection days, but that it was possible. MESA argued, however, that a "clean" inspection of the entire mine within the meaning of section 104(c)(2) occurs only when MESA conducts a regular quarterly inspection from beginning to end after the underlying section 104(c)(1) order has been issued. The judge disagreed stating:

> The evidence presented is not sufficient to support a finding that there has not been a complete inspection of the entire mine following the issuance of the 104(c)(1) order which disclosed no similar violations. I cannot conclude, simply because MESA had not completed an entirely new 3 month cycle of inspections following the issuance of the (c)(1) order, that there had not, in fact, been an intervening "clean" inspection of the entire mine. [Decision at 4.]

He concluded that MESA had not presented a prima facie case to show that a "clean" inspection of the entire mine had not occurred in the period between the two orders.

2/ On March 8, 1978, this case was pending on appeal before the Secretary of Interior's Board of Mine Operations Appeals under the 1969 Coal Act. This appeal is before the Commission for disposition under section 301 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C.A. §961 (1978).

We agree with the judge that a prerequisite to the issuance of an order of withdrawal under section 104(c)(2) of the 1969 Coal Act was the absence of an intervening "clean" inspection of the entire mine, and that it was MESA's obligation to present a prima facie case of that fact to sustain the order.

We also agree that MESA failed to prove this prerequisite in this case. The requirement of a clean inspection before an operator could avoid being subjected to section 104(c)(2) withdrawal orders was intended to further public interest in promoting earnest and continuous compliance with mandatory safety and health standards. Nothing in the record, however, suggests that the Secretary's position--that only a complete regular quarterly inspection can constitute a "clean" inspection of the entire mine--is necessary to achieve this interest.

Accordingly, the judge's decision is affirmed.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 4, 1980

GLENN MUNSEY :
:
v. :
:
SMITTY BAKER COAL COMPANY, INC., : Docket No. NORT 71-96
P&P COAL COMPANY, AND : IBMA 72-21
RALPH BAKER :

DECISION

The United States Court of Appeals for the District of Columbia Circuit remanded this case to the Commission to consider the following issues:

1) Whether Ralph Baker can be ordered to rehire Glenn Munsey at Mason Coal Company; 2) whether P&P Coal Company is a successor to the Smitty Baker Coal Company which may be ordered to reinstate Munsey: and 3) whether P&P Coal Company, even if not a successor, may be liable under section 110(b)(1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)(amended 1977)("the 1969 Coal Act") for refusing to hire Munsey. Munsey v. FMSHRC, 595 F.2d 735, 745 (D.C. Cir. 1978).

On appeal, the D.C. Circuit affirmed the administrative law judge's finding that Smitty Baker Coal Company and Ralph Baker violated section 110(b) of the 1969 Coal Act. The incidents leading to the finding of a violation of the Act's anti-discrimination provision occurred in 1971. Since that time this case has twice reached the Court of Appeals and has now come to the Commission to determine what remedy is due to Glenn Munsey and who must provide it. In the intervening time Smitty Baker Coal Company ceased mining operations; P&P Coal Company purchased a lease and equipment from Smitty Baker Coal Company and opened the former Smitty Baker No. 2 Mine; and Ralph Baker incorporated a new mining company, Mason Coal Company, in a different location from that of the former Smitty Baker Coal Company operation.

For the reasons that follow, we hold that Ralph Baker can be ordered to reinstate Munsey at Mason Coal Company; that P&P Coal is a successor to Smitty Baker Coal Company; and that Ralph Baker, Smitty Baker Coal Company, and P&P Coal Company are jointly and severally liable for the illegal discrimination against Glenn Munsey. We further hold that P&P Coal cannot be held liable for an alleged independent act of discrimination arising out of its asserted failure to hire Munsey. Finally, we remand for additional findings on whether appropriate offers of reinstatement have already been made by Ralph Baker or P&P Coal, the amount of lost wages due to Munsey, and the costs and expenses to be awarded.

I.

Ralph Baker was general manager of Smitty Baker Coal Company and was responsible for the day-to-day operations of that company. The Court of Appeals affirmed the administrative law judge's conclusion that Baker violated section 110(b) of the 1969 Coal Act by refusing to rehire Glenn Munsey on April 29, 1971.

The Smitty Baker Coal Company stopped mining operations in October, 1971, due to a strike and did not resume operations after the strike was settled in late 1971. As of 1975, the Smitty Baker Coal Company still had active accounts. Ralph Baker now owns all the stock of Mason Coal Company, which began operations in May or June, 1972, in a different location from that of the Smitty Baker Coal Company. His testimony indicates that his authority at Mason Coal Company encompasses the hiring of employees.

Section 110(b)(2) of the 1969 Coal Act requires a violator of section 110(b)(1) to "take such affirmative action to abate the violation as the [Commission] deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner ... to his former position with back pay." 30 U.S.C. §820(b)(2) (1976). Remedies in discrimination cases should be suited to the individual facts of each case and designed to eliminate the effects of illegal discrimination. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 364 (1977); Southern Tours, Inc. v. NLRB, 401 F.2d 629 (5th Cir. 1968). As the Court of Appeals found, Ralph Baker illegally discriminated against Munsey. Therefore, we must afford such affirmative relief as will best restore Munsey to the position in which he would have been but for the illegal discrimination. We hold that on the facts of the case reinstatement by Ralph Baker at Mason Coal Company, with such seniority and benefits as Munsey would have had if the illegal discrimination had not occurred, is an appropriate remedy in order to fully compensate Munsey for the effects of the illegal discrimination he suffered.

The record, however, raises a question as to whether Baker may have already made a suitable offer of reinstatement. Baker testified in December, 1975, that he offered Munsey employment at Mason Coal Company "maybe a year ago, maybe not that long." In his testimony, Munsey mentioned neither an offer of employment from Baker nor a request for a job at Mason Coal. No findings have been made on this issue. If a suitable offer was made and refused, then the need to offer reinstatement now is moot. Also, the making of a suitable offer would toll the accumulation of lost wages due to Munsey as the result of the violation. Thus, we remand for further proceedings the question of whether Baker has made a suitable offer to Munsey of employment at Mason Coal Company.

II.

In March, 1972, approximately five months after it had ceased operations, Smitty Baker Coal Company transferred some of its interests in coal leases to Clyde and Charlie James Poe. The transferred coal leases included Smitty Baker Coal Company's No. 2 mine, but did not include the No. 1 mine in which Munsey had worked. Rights to certain machines, some of which had been used in the No. 1 mine, were transferred. The Poes subsequently renegotiated the lease with Peabody Coal Company, the owner of the leases both before and after these transfers. The Poes incorporated under the name P&P Coal Company and began mining in March 1972. Glenn Munsey, alleging P&P Coal to be a successor company to Smitty Baker Coal Company, moved to add P&P Coal as a respondent in 1975. That motion was granted by the administrative law judge. The administrative law judge found, however, that P&P was not liable to Munsey as a successor. The Court of Appeals remanded this question to the Commission for consideration.

The legislative history on section 110(b) of the 1969 Coal Act supports the conclusion that the protection afforded miners is similar to that in existing provisions in other labor statutes. As Senator Kennedy stated:

> My proposed amendment, then, simply puts into the Coal Mine Health and Safety Act the same protection which we find in other legislation.

115 Cong. Rec. 27948 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Part I at 667 (1975). In certain circumstances, the protections of those other statutes have been construed to include the liability of bona fide purchasers and other successors for their predecessors' acts of discrimination. E.g., Golden State Bottling Co., Inc. v. NLRB, 414 U.S. 168 (1973); U.S. Pipe & Foundry Co. v. NLRB, 398 F.2d 544 (5th Cir. 1968); International Technical Products, 249 NLRB No. 183, 104 LRRM 1294 (1980). We believe that in appropriate cases the successorship doctrine should also be applied under the 1969 Coal Act.

The United States Court of Appeals for the Sixth Circuit has enumerated several factors to be considered in determining whether under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) et seq. (1976), a new business entity is a successor employer:

> 1) [W]hether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or

> substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production and 9) whether he produces the same product.

EEOC v. MacMillan Bloedel Containers, Inc. 503 F.2d 1086, 1094 (6th Cir. 1974). We find that these factors provide a useful framework for resolving the question of successorship in the present case.

The first factor to be weighed is whether the asserted successor, P&P Coal Company, had notice of the charge of discrimination and possible liability at the time of its acquisition of the predecessor's business operations. The administrative law judge found that the owners of P&P and representatives of Smitty Baker Coal Company did not discuss Munsey's discrimination complaint during the negotiations on the transfer of the lease. The administrative law judge also found that one of the owners, Charlie James Poe, knew generally that there was a dispute, but did not know that it involved an alleged discriminatory discharge. The judge concluded, "P&P Coal acquired its interest in this company with no knowledge that applicant [sic] was liable to applicant for a discriminatory discharge."

The administrative law judge erroneously relied on knowledge of liability, rather than notice of proceedings which could lead to liability, in reaching his conclusion that P&P Coal is not a successor to Smitty Baker Coal Company. See Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975); U.S. Pipe and Foundry Co. v. NLRB, supra. P&P admitted in its answer to Munsey's motion to add it as a respondent "that it was aware of the litigation between the applicants and Smitty Baker Coal Company." Further, an administrative law judge had issued a decision on February 29, 1972, in which he found Smitty Baker Coal Company liable to Munsey for reinstatement, back pay, and costs including attorney's fees. P&P had sufficient notice to enable it to protect itself by either an indemnification clause or a lower purchase price in the takeover agreement. See Golden State Bottling Co. v. NLRB, 414 U.S. 168, 185 (1973). P&P also presented evidence on the question of its successorship. P&P clearly had sufficient notice of the litigation between Munsey and Smitty Baker Coal Company to be held liable for back pay and reinstatement if other facts of this case show P&P to be a successor.

The ability of the predecessor to provide relief is the second factor to be considered. In his decision, issued in 1976, the administrative law judge found that Smitty Baker Coal Company's accounts "remain active and there is still money in them." He did not make a finding regarding the amount of money in the accounts. Assuming that funds sufficient to cover the monetary award due to Munsey are in the accounts, the question of reinstatement for Munsey remains. Munsey will not be made whole unless he also is offered "reinstatement ... to his former position." 30 U.S.C. §820(b)(2). Smitty Baker Coal Company, the predecessor, no longer is active in mining operations and can not reinstate Munsey. Thus, in the present case the predecessor can not provide complete relief.

The third factor, whether there has been a substantial continuity of business operations, has been termed the "successorship keystone". Saks and Co., 247 NLRB No. 128, 103 LRRM 1241 (1980). The Supreme Court relied heavily on this factor in John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 551 (1964), in which it held that the disappearance of a corporation by merger did not necessarily terminate the rights of employees under a collective bargaining agreement, and that a successor could be compelled to arbitrate. 1/ The Court stated:

> Although Wiley [the alleged successor] was substantially larger than Interscience [the predecessor], relevant similarity and continuity of operation across the change in ownership is adequately evidenced by the wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty.

376 U.S. at 551. This emphasis on the continuity of the workforce was reaffirmed in Howard Johnson Co. v. Hotel Employees, 417 U.S. 249 (1974). The Court, distinguishing its decision in John Wiley & Sons, supra, noted that Howard Johnson Co., whom the Court found not to be a successor, selected and hired its own work force and employed very few of its predecessor's workers. 417 U.S. at 259-260.

The administrative law judge found that "many" of the miners hired by P&P were not former Smitty Baker Coal Company employees; however, Charlie James Poe, president of P&P, testified that, needing experienced miners, he asked Ralph Baker if P&P could hire Baker's former employees. With Baker's agreement, P&P hired the Smitty Baker Coal Company employees according to the Baker senority list without any screening. While the percentage of former Baker employees in the P&P workforce is unclear from Poe's testimony, it was at least 50 percent and possibly as high as 70 percent. 2/ P&P's testimony indicates that it would have hired Smitty Baker employees exclusively if they had been available. Thus, we find that the composition of the work force remained substantially the same.

1/ Analysis of cases determining the bargaining obligations of successor employers does not differ significantly from that of cases concerning the obligation to remedy the effects of the predecessor's illegal discrimination.

2/ Poe testified:

> Approximately how many employees did you have there during the first month of operation?
>
> A. I believe we finally wound up with twenty-four I believe the first month and ten.
>
> Q. How about the second month?
>
> A. That was probably it for a while. I'm afraid to say unless I went back to the records. I believe fifteen of those men were taken directly from Mr. Baker's seniority list and two of them were his bookkeeper and Fred Coburn were company men which I retained. That made seventeen in all you see. I believe that's right.

Transcript at 407-408. From this testimony, it is unclear whether Poe had 24 or 34 employees during the first month of operation.

In determining whether there has been substantial continuity of the employing industry, the NLRB has considered additional factors including the existence of a hiatus between the closing of the business and the reopening by an alleged successor. Mondavi Foods Corp., 235 NLRB 1080, 98 LRRM 1102 (1978); Radiant Fashions, Inc., 202 NLRB 938, 82 LRRM 1742 (1973). In Radiant Fashions, the Board characterized a three month hiatus as "lengthy", and viewed it to be a "significant" though not "controlling" factor in determining whether there had been a substantial continuity of business operations. In the present case, there was about a five month hiatus between the cessation of the active Smitty Baker operation and the opening of P&P Coal. At least the first month of this gap is attributable to a mine strike, and should not necessarily be counted as an interruption of business operations.

The remaining factors discussed in MacMillan Bloedel concern the degree of identity between the former employer and the alleged successor. The first inquiry is whether the same plant is used. The specific mine in which Munsey worked was not operated by P&P. P&P reopened another mine operated by the Smitty Baker Coal Company, the No. 2 mine. P&P emphasizes that it did not work the mine where the controversy arose and that it leased approximately 3,500 acres from Peabody Coal Company whereas Smitty Baker Coal had only leased 300 acres. However, P&P first contracted to take over Smitty Baker Coal's leases and later renegotiated the lease with Peabody Coal. The proper inquiry is not whether P&P took over the actual locus of the dispute, but whether it substantially replaced the Smitty Baker Coal Company's operations. P&P took over Smitty Baker Coal Company's Peabody lease and reopened one of its mines. P&P used equipment that it had purchased from Smitty Baker and that Smitty Baker had used in its operation. We find that P&P Coal Company operated the substantial equivalent of the Smitty Baker Coal Company "plant." See Mondavi Foods Corp., supra.

Regarding the continuity of supervisory personnel, the record indicates that P&P hired a section foreman of Baker Coal who became P&P's mine superintendent. P&P also hired Smitty Baker's bookkeeper as its bookkeeper. Additional information as to the supervisory personnel of P&P is lacking in this record.

Use of the Smitty Baker Coal Company senority list and retention of collective bargaining representatives indicate that the same jobs and working conditions probably continued. There is no evidence comparing production methods of the two companies. The same product, coal, was produced.

We recognize that the resolution of any question concerning successorship involves "striking a balance between the conflicting legitimate interests of the bona fide successor, the public, and the affected employee." Golden State Bottling Co. v. NLRB, 414 U.S. at 181. After careful consideration of all the circumstances of this case, we conclude that the purposes of section 110(b) of the 1969 Coal Act are best served, and the balance appropriately struck in the present case, by a finding that P&P is a successor to the Smitty Baker Coal Company. As has been stated, "Where the harm to the discriminatee and to the national policy that would flow from a finding of no successorship is great, a substantial amount of harm to the new employer must and will be tolerated." Brown v. The Evening News Association, 473 F. Supp. 1242, 1246 (E.D. Mich. 1979). See also Golden State Bottling Co., supra. Congress declared in section 2(a) of the 1969 Coal Act that the first priority and concern of all in the coal mining industry must be the health and safety of the miner. Section 110(b) was intended to support and enhance the protection of miners. We believe that the facts of this case and the need to afford Glenn Munsey a full remedy require holding P&P Coal, as a successor, jointly and severally liable for the illegal act of discrimination.

Before the administrative law judge, Charlie James Poe testified that Munsey had asked him for a job when he was first opening his mining operation, and that he had told Munsey that he would get to him if he was on the seniority list. Poe also testified that Munsey's name had remained on the seniority list. Poe further stated that Munsey had replied that he did not want a position at the P&P operation because he was employed elsewhere. Munsey's testimony contradicts Poe's. Munsey testified that he asked Poe for a job several times and was turned down on each occasion. The administrative law judge did not resolve this conflict; he made no findings on whether P&P Coal had offered appropriate employment to Munsey. As with the question regarding whether Ralph Baker offered Munsey suitable employment at Mason Coal Company, this question must be determined on remand.

III.

The Court of Appeals directed the Commission to consider whether P&P Coal Company, even if it is not a successor to Smitty Baker Coal Company, is liable for an independent act of discrimination against Munsey. The administrative law judge, apparently relying on the fact that Munsey was never employed by P&P and made no reports concerning safety conditions at P&P, found that P&P was not liable to Munsey.

We need not reach in this case the issue of the necessity of an employment relationship to trigger the protection against retaliation for making safety complaints. Section 110(b) states that a miner who believes himself to be discriminated against may file an application for review with the Secretary within thirty days of the alleged violation. Munsey did not file such an application against P&P. His motion to add P&P as a respondent was granted in April, 1975, and only alleged that P&P was liable as a successor for the violation committed by Smitty Baker Coal Company. The theory of the possible independent liability of P&P apparently was suggested for the first time in the Court of Appeals in 1978. We hold that the separate allegation against P&P Coal for not hiring Munsey was not raised in a timely manner. We further hold that, whether or not the time for filing a claim of discrimination under section 110(b) of the 1969 Coal Act can be extended in other circumstances, it is inappropriate to toll the statutory period for the number of years involved in this case. We note that Munsey agrees that if P&P is found to be a successor, as we have concluded, the issue of P&P's further liability, based on an asserted separate act of discrimination, need not be reached because Munsey will have been afforded full relief for the wrong he has suffered.

IV.

We hold Ralph Baker, Smitty Baker Coal Company, and P&P Coal Company jointly and severally liable to Munsey for lost wages, and Ralph Baker and P&P Coal jointly responsible to reinstate Munsey with accrued benefits and seniority. We remand for further proceedings to determine whether Ralph Baker or P&P Coal has already made an appropriate offer of reinstatement.

The administrative law judge determined that $2,013.26 was due to Munsey for lost wages from April 29, 1971, until the close of the Smitty Baker Coal Company in October, 1971. We order Ralph Baker, Smitty Baker Coal Company, and P&P Coal Company, jointly and severally to immediately pay this amount, plus interest, to Munsey. We remand for such proceedings necessary to further determine the additional amount of lost wages and interest due to Munsey.

Further, we remand for assessment of attorney's fees and other costs incurred by Munsey in this litigation. We award these expenses jointly and severally against Ralph Baker, Smitty Baker Coal, and P&P Coal pursuant to section 110(b)(3) of the 1969 Coal Act.

Finally, in view of the protracted history of this litigation, we order that the proceedings on remand be expedited.

Richard V. Backley, Chairman

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Glenn Munsey
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 9, 1980

LOCAL UNION 1957, UNITED MINE :
WORKERS OF AMERICA, :
David Biggs, et al. :
: Docket No. VINC 77-112
v. :
:
SOUTHERN OHIO COAL COMPANY :

DECISION

This discrimination case arises under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976)(amended 1977). The issue is whether six miners 1/ were discriminated against by their employer, Southern Ohio Coal Company, in violation of section 110(b)(1) of that Act. 2/

The administrative law judge found that a large body of water existed in the miners' route to their workplace in the entry at the end of a mantrip; that the miners believed the route was unsafe, complained to mine management about it, and refused to cross it 3/; and that their shift foreman denied them alternate work, which was available, because he believed they were not entitled to refuse to cross the water to work on their regular jobs. The judge ruled that there was no violation of the Act, since the evidence did not establish that these miners were denied alternate work by their employer because of the miners' safety complaints. 4/

1/ The miners' names are David Biggs, Thurmond Adkins, Ruler M. Champe, Curtis Chaney Jr., Donald A. Hunter, and Chester Young.

2/ Section 110(b)(1) provides in part:

> No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger ***.

3/ "The record is clear that Applicants' request for their safety committeeman arose out of genuine concern over a safety condition, and was not the outgrowth of some general labor dispute with management." J.D. 13.

4/ The judge stated that "whether such actions were discriminatory depends on whether Respondent was motivated by a desire to retaliate against applicants for their reporting of safety complaints...." J.D. 14 (emphasis added).

We have difficulty at arriving at the conclusion reached by the judge in light of the evidence and the judge's own findings. The foreman's testimony is clear that the reason he denied the miners alternate work was because they had refused to cross the water to perform their regular jobs. 5/ The judge found that this refusal by the miners was reasonable and in good faith. J.D. 7, 8, 11. 6/ The Union argues that the miners' actions in these circumstances were protected under section 110. We agree. Alternate work was available, was requested, and was denied because the miners refused to work in conditions they believed were unsafe. The miners' actions were protected by section 110 and the foreman's refusal to afford them alternative work violated that section.

Accordingly, the decision of the administrative law judge is reversed and remanded to determine the amounts of back pay and any other relief owed to the miners.

Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson

A. E. Lawson, Commissioner

Marian Pearlman Nease

Marian Pearlman Nease, Commissioner

5/ J.D. 14-15, citing Tr. 819-820.

6/ So too was the miners' refusal to take other routes, which they also believed were unsafe. Id.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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December 10, 1980

SECRETARY OR LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
:
v. : Docket No. DENV 79-1-P
:
CO-OP MINING COMPANY :

DECISION

On October 16, 1979, the administrative law judge issued a decision and order approving the proposed penalty settlement of the parties with respect to an alleged violation of 30 C.F.R. §70.250(b). 1/ The approval was based upon a stipulation of settlement prepared by the parties. The Secretary alleged that Co-op had failed to submit a respirable dust sample for one miner whom the Secretary identified by his social security number, 528-96-5108.

The parties stipulated that Co-op's records indicated the company never employed a miner with that social security number. They also stipulated that Co-op did employ a miner with the social security number 528-96-5109, and that the required dust sample had been submitted for that miner. These stipulated facts were quoted by the judge in his decision and order, which we directed for review sua sponte.

We hold that under the circumstances in this case, the settlement should not have been approved. The parties' stipulation shows that the alleged violation did not occur. The legislative history of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979), states, "The purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards." 2/ To assure this purpose is served section 110(k)

1/ 30 CFR §70.250(b) provides:

> One sample of respirable dust shall be taken from the mine atmosphere to which each individual miner assigned to a working section is exposed at least once every 120 days, except those miners already sampled during such 120-day period in sampling cycles conducted under the provisions of §§70.210, 70.220, and 70.230 of this part.

2/ S. Rep. No. 95-181, 95th Cong., 1st Sess. 41 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th., Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 629 (1978).

of the Mine Act places an affirmative duty upon us to oversee settlements. Compliance with the Act and its standards is not fostered by payment of a civil penalty where the stipulated facts establish that no violation occurred. Accordingly, the notice of violation is vacated, the order approving the settlement and ordering payment is reversed, and the proceeding is dismissed.

Backley
Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

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Honorable George A. Koutras
Office of Administrative Law Judges
5203 Leesburg Pike, 10th Flcor
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 19, 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. HOPE 78-722-P
ALLIED CHEMICAL CORPORATION	:	

DECISION

This civil penalty proceeding arises under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979) ("the Mine Act"). 1/ In his decision, the administrative law judge concluded that Allied Chemical Corporation (Allied) had not violated 30 CFR §75.1404 as alleged by the Secretary of Labor, and dismissed the Secretary's petition for assessment of civil penalty. For the reasons below, we remand to the judge for further proceedings.

Certain facts are undisputed. On September 8, 1977, while hauling loaded mine cars in Allied's Shannon underground mine, the trolley harp assembly supplying electrical power to the locomotive became disengaged. The motorman was unable to control or stop the locomotive, which subsequently derailed. Both the brakeman and the motorman jumped from the moving locomotive before the derailment. The brakeman was killed and the motorman was injured.

A withdrawal order was issued to Allied on September 9, 1977, alleging a violation of the mandatory standard at 30 CFR §75.1404. The order stated:

1/ The inspector issued the withdrawal order at issue on September 9, 1977, pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (1976) ("the Coal Act"). The Secretary filed his petition for assessment of civil penalty on August 29, 1978, after the effective date of the Mine Act. Thus, while the violation occurred under the Coal Act, these proceedings arise under the Mine Act.

> The pneumatic braking system on the ... locomotive ... was not sufficient to control a trip of 28 loaded mine cars which were involved in a run-a-way trip. The brake shoes were not properly aligned with the trucks [locomotive wheels] and could not apply uniform frictional pressure on the braking surface....

Allied contested the order and a hearing was held before the administrative law judge. In his decision the judge concluded that the locomotive in question had a dual braking system "installed." 2/ He further concluded that the Secretary had not proven that the locomotive was being operated outside its design capabilities, or had been operated at excessive speed. The Secretary filed a petition for discretionary review, which we granted in part. 3/ The issue before us on review is whether the judge correctly interpreted and applied 30 CFR §75.1404.

The standard at issue provides:

> §75.1404 Automatic brakes; speed reduction gear.
> [Statutory Provisions]
> Each locomotive and haulage car used in an underground coal mine shall be equipped with automatic brakes, where space permits. Where space does not permit automatic brakes, locomotives and haulage cars shall be subject to speed reduction gear, or other similar devices approved by the Secretary, which are designed to stop the locomotives and haulage cars with the proper margin of safety.
>
> §75.1404-1 Braking system.
> A locomotive equipped with a dual braking system will be deemed to satisfy the requirements of §75.1404 for a train comprised of such locomotive and haulage cars, provided the locomotive is operated within the limits of its design capabilities and at speeds consistent with the conditions of the haulage road....

2/ The parties agree that a dual braking system consists of a dynamic or electric brake system and a pneumatic or service brake system.

3/ In his petition for discretionary review, the Secretary also assigned as error the judge's conclusion that he had not established by a preponderance of the evidence an adverse effect on the locomotive's braking capacity caused by misaligned brake shoes. However, under the authority of section 113(d)(2)(A)(i) of the Mine Act, 30 U.S.C. §823 (d)(2)(A)(i), we declined to direct that issue for review.

Allied argued before the judge, and argues before us, that to comply with the cited standard a locomotive merely has to have a dual braking system installed, and that the standard is not directed at the operability of the system. In Allied's words, the standard establishes "design" criteria and does not impose "maintenance" requirements. In our view the judge's resolution of this issue is ambiguous. At the conclusion of his decision, the judge appears to accept Allied's interpretation, but in other portions of his decision he apparently considered the operability of the braking system. To resolve any doubts, we hold that 30 CFR §75.1404-1 requires that a dual braking system be both present and operable. Thus, a violation of the standard can be established by proving that a locomotive is not equipped with an operable dual braking system. The standard can also be violated if the locomotive is operated beyond its design capabilities or at speeds inconsistent with haulage road conditions.

We believe that any other result would be contrary to the remedial intent of the Coal Act, the Mine Act, and this standard, as well as common sense. 30 CFR §75.1404 restates section 314(e) of the Coal Act. 30 CFR §75.1404-1 merely establishes a permissible alternative to the automatic brakes required by the statutory provision. Section 314(e) in turn reiterates section 214(e) of S. 2917, the Senate version of the Coal Act, and is quite similar to the House version. The Senate Report stated: "This provision will reduce, substantially, the number of haulage collisions that are responsible for many accidents." 4/ The House Report stated that section 314(e) "requires automatic brakes, speed reduction devices, or other safeguards ... to be certain that the equipment can be stopped promptly." 5/ Where Congress indicated in such unequivocal terms that its objective was to stop equipment promptly in order to prevent accidents, it could not have intended merely that locomotives be equipped with dual braking systems, and have been indifferent to whether the brakes were operable. If brakes are to stop a locomotive promptly, it is axiomatic that, once installed, they must be operable.

We turn now to the question of whether the judge properly applied the standard in this case. The judge found that "the failure of the locomotive brakes to function was due to the unexpected loss of power caused by the loss of the trolley harp assembly, which in fact resulted in the unanticipated loss of braking air pressure due to the loss of electrical power." The judge found "no indication that the ... operator

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4/ S. Rep. 91-411, 91st Cong., 1st Sess. at 82 (1969); reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Part I at 208 (1975) ["Legis. Hist."].
5/ H. Rep. 91-563 at 55; Legis. Hist. at 1085.

experienced any difficulties in negotiating the grades traveled on the very day of the accident ... or that he experienced any difficulty in braking and controlling the locomotive...," but that his difficulties began when the loss of power "incapacitat[ed] all of the locomotive brake systems."

The Secretary submits that the judge's finding, that the brakes failed because of a loss of electrical power, is contrary to the evidence. He submits that of the three possible causes of the locomotive's brake failure, the judge considered only two: operator error and loss of power. In attributing the brake failure to the latter, he did not consider the third possible cause, systemic failure. The Secretary bases his assertion on the apparent failure of both portions of the pneumatic brake after the loss of the harp assembly. He contends that notwithstanding the loss of electricity, a single application of the primary pneumatic component should not have exhausted the air supply; the pneumatic brake should have stopped the locomotive. Even if the primary pneumatic component failed, "the loss of electrical power cannot rationally explain the failure of the truck emergency component to stop the locomotive...." He emphasizes that the truck emergency brake does not rely on electricity and is immune to air demands of other equipment. Therefore, the only logical explanation for its failure to stop the locomotive after the primary pneumatic brake failed to do so, is that it was defective. The Secretary contends that "[s]ubsequent testing confirmed that the truck emergency [brake] was defective," because the brakes failed in three surface tests conducted on level ground. Citing the testimony of Allied's expert witness, the Secretary submits further that because the truck emergency brake is an integral part of the pneumatic system, any defect in it meant that the pneumatic system was defective. Therefore, in the Secretary's view, the locomotive was not equipped with an operable dual braking system as 30 CFR §75.1404-1 requires.

In sum, the Secretary contends that the judge's analysis is flawed because the loss of electricity does not adequately explain the failure of the dual braking system. In the Secretary's view the primary pneumatic brake should have had sufficient air, even without electricity, to stop the locomotive on nearly level ground. Once the primary pneumatic brake failed, he believes that an operable truck emergency brake, as part of the dual braking system, with its independent air supply, should have stopped the locomotive.

Allied contends that it was in compliance with 30 CFR §75.1404: "A dual braking system was present and the locomotive was operated within design capabilities and at speeds consistent with the haulage road conditions." Allied rejects the Secretary's argument that the truck emergency brake is a part of the pneumatic system, was inoperative and therefore that the pneumatic braking system was deficient. Allied cites the testimony of its expert witness that the truck emergency brake is independent of the dual braking system. It compares the technical expertise of that expert witness to the "speculative opinion testimony" of the allegedly untrained MSHA inspector, urging the correctness of the judge's reliance on the former.

Allied asserts further that the Secretary introduced no evidence to demonstrate that the truck emergency brake was inoperable. It argues that the surface tests to which the Secretary refers involved bleeding off pressure in the main reservoirs, not in the truck emergency brake. Allied submits that this demonstrated nothing about the truck emergency brake, which would have required 24 hours to replenish its air supply. In conclusion, Allied asserts that the Secretary failed to demonstrate that the truck emergency brake was part of the pneumatic system or that it was inoperable. Allied submits that the judge considered the truck emergency brake and all other possible causes of brake failure, and that the judge properly determined that the loss of electrical power was the sole cause of the failure.

30 CFR §75.1404-1 permits a locomotive to be equipped with a dual braking system as an acceptable alternative to the automatic brakes mandated by 30 CFR §75.1404. Neither the regulation nor the legislative history of section 314(e) of the 1969 Act (which §75.1404 restates) defines a dual braking system. The parties appear to agree that a dual braking system consists of a dynamic braking system and a pneumatic braking system. They also agree generally as to the operation of at least the primary pneumatic brake. They disagree, however, on what constitutes the pneumatic braking system, and whether the truck emergency brake is part of the pneumatic braking system. They disagree further as to whether the truck emergency brake was operable. The ensuing controversy colors the entire case.

Although the judge found that "the locomotive had a dual braking system installed ...," he did not explicitly determine what constituted the pneumatic portion of the dual braking system. We believe that the judge should have made explicit findings as to whether the truck emergency brake and its air supply were part of the pneumatic braking system. The failure to determine whether the truck emergency brake was part of or independent of the pneumatic braking system leaves unanswered the major factual issue in this case, whether the dual braking system was operable. If the truck emergency brake were found to be part of the pneumatic system, questions remain as to whether it was operable in these circumstances and could have supplied air to the brake cylinders after the main air supply was depleted. We also believe that the loss of the harp assembly does not explain the total breakdown of the dual braking system. The loss of the harp assembly should have caused the complete failure of only the electrically-powered dynamic brake. The other component of that dual braking system, the pneumatic braking system, is not fully dependent upon electricity. Electricity powers the compressor to maintain adequate air supply. If operable, it should have continued to function at least until the air supply in its tanks was exhausted; the loss of electricity would merely have prevented the replenishing of that air supply.

Therefore, we remand to the judge for further proceedings. Specifically, we remand for a finding as to whether the dual braking system was operable. In order to make this ultimate finding, findings are also necessary on why the primary pneumatic brake failed to stop the train after the electricity was interrupted; whether the truck emergency brake is part of the pneumatic portion of the dual braking system; and, if so, why it failed to stop the train.

Richard V. Backley
Richard V. Backley, Chairman

Frank F. Jestrab, Commissioner

A. E. Lawson
A. E. Lawson, Commissioner

Marian Pearlman Nease
Marian Pearlman Nease, Commissioner

Allied Chemical Co.
HOPE 78-722-P

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Administrative Law Judge Decisions

DEC 1 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 80-2-M
Petitioner	:	Assessment Control
v.	:	No. 44-02965-05005F
	:	
A. H. SMITH STONE COMPANY,	:	Louisa Quarry and Mill
Respondent	:	

DECISION

Appearances: Barbara Krause Kaufmann, Attorney, Office of the Solicitor, U.S. Department of Labor, for Petitioner;
A. H. Smith, Jr., and Wheeler B. Green III, Branchville, Maryland, for Respondent.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued August 28, 1980, a hearing in the above-entitled proceeding was held on October 21, 1980, in Falls Church, Virginia, under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

After the parties had completed their presentations of evidence, I rendered the bench decision 1/ which is reproduced below (Tr. 101-114):

> This proceeding involves a Petition for Assessment of Civil Penalty filed in Docket No. VA 80-2-M on November 8, 1979, by the Secretary of Labor, seeking to have a civil penalty assessed for an alleged violation of 30 C.F.R. § 56.11-1.
>
> The issues in a civil penalty case are whether a violation occurred and, if so, what civil penalty should be

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1/ A petition seeking review of my bench decision was filed with the Commission by respondent on November 21, 1980. Since I had not yet issued my decision in final form, the official file was still in my office. Therefore, the petition was routed to me so that it could be placed in the official file.

assessed based on the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977.

I shall make some findings of fact on which my decision will be based. I shall set them forth in enumerated paragraphs.

1. A. H. Smith Stone Company, according to a stipulation of the parties, had 163,693 man-hours in 1979. The company operates the facility which is involved in this proceeding, namely, the Louisa Quarry and Mill which is located in Louisa County, Virginia. The man-hours worked at that particular facility in 1979 were 47,586.

The parties have stipulated that the company is subject to the provisions of the Act.

2. On January 25, 1979, Mr. James H. Whalen, the operator of the crusher at the Louisa Quarry and Mill was found head first in the primary crusher, resulting in his death before he could be extricated from the crusher.

On January 26, 1979, the day after the fatality occurred, several people made an investigation of the accident. The only person representing MSHA during that inspection who testified here today was Inspector Charles W. Quinn. He stated after he had examined the feeder at the site where Mr. Whalen was killed, that he had concluded that there was not a safe means of access to and from the feeder.

For that reason, he wrote Citation No. 301536, dated January 26, 1979, alleging a violation of section 56.11-1, which provides that a "[s]afe means of access shall be provided and maintained to all working places."

3. There were a number of photographs introduced into evidence in this proceeding. They are essential for an understanding of the area where the victim was killed and also of the physical layout of the facility where Inspector Quinn felt a violation of section 56.11-1 had occurred.

Some of these exhibits were introduced by Inspector Quinn and some by the company. All the photographs have been very helpful in showing the situation which existed. Exhibit No. 4-A shows how a person who is 5'8" tall would have to proceed and how he would have to move his body in order to get out of the feeder in the vicinity of the control booth from which the crusher is operated.

4. Exhibit No. 4-D is a very close-up picture of the exact area where a person would have to stand if he wanted to get out of the feeder. That picture indicates that an individual leaving the feeder would have to stand on what is known as a "grizzley," which consists of 4-inch wide metal strips with an opening between them of about 6 inches.

Although the witnesses, or at least Mr. Christopher, who was a witness for the respondent, indicated that the grizzley is 5 feet long, a person coming out of the control booth, or going into it from the feeder, is considerably closer to the terminal end of the grizzley on the side of the crusher than 5 feet, according to Exhibit No. 4-D.

5. Exhibit No. A-6 shows a good view of the grizzley at the site where a person would be if he wanted to go out at the control booth and it is especially obvious that a person stepping up from the feeder would be stepping up, from an insecure footing, a distance of 2 feet.

6. Exhibit No. A-10 is a close-up view of the feeder and control booth after a handrail was installed near the control booth and after a step was made toward the top of the feeder. Those improvements were made in order for the company to abate the violation alleged in Citation No. 301536.

7. Ms. Kaufmann correctly stated in her remarks that no one knows for sure what caused Mr. Whalen to fall into the crusher, but we do have the testimony of Mr. Christopher who was the person who last talked to Mr. Whalen before his death. Exhibit No. A-4 shows the end of the feeder farthest from the control booth and, according to Mr. Christopher's testimony, Mr. Whalen, the victim, was standing in the feeder about 3:50 p.m. when Mr. Christopher last talked to him. That was on January 25, 1979. At that time, Mr. Christopher told Mr. Whalen an explosive charge would be set off in the quarry and that Mr. Whalen should shut off the crusher and could leave for the day after he had finished cleaning the feeder which was almost entirely free of residue at that time.

8. When Mr. Christopher had returned to the area of the feeder after obtaining the detonating equipment for setting off the blast, he realized that Mr. Whalen was not in sight at any of the places where he normally saw him at that time of day. Consequently, he made a search for Mr. Whalen and eventually found his body in the crusher with his head foremost into the crusher and his legs sticking out the top. At that time, Mr. Whalen was already dead.

9. When Mr. Christopher talked to Mr. Whalen at 3:50 p.m., the feeder was not operating but the crusher was. At 3:50 p.m., the feeder still had rock in it which needed to be transported by the feeder into the crusher. When Mr. Christopher returned around 4:00 or 4:05 p.m. to the vicinity of the feeder, the material in the feeder had been discharged into the crusher, but the crusher was still running.

10. The inspection report written by MSHA's investigators was received into evidence as Exhibit F. That report indicates on page three that Mr. Whalen was an epileptic and that he was normally taking phenobarbitol to counteract his illness and an analysis of his blood showed a rather high concentration of aprobarbital.

Despite the fact that Mr. Whalen had been under a doctor's treatment for his problem, Mr. Christopher worked with him for approximately 8 years without noticing that Mr. Whalen had any problems in the form of dizziness or slurred speech or any indication he had an abnormal condition of any kind. Mr. Christopher did not observe any unusual physical attributes about Mr. Whalen at 3:50 p.m. on January 25, 1979, when Mr. Christopher last talked to Mr. Whalen before his death.

I believe that generally summarizes the facts in this case.

As I have indicated in the findings, the feeder was not equipped with any type of step or handrailing to assist a person who had been working in the feeder to get out of the feeder once he had finished that work.

The testimony indicates that it was the practice, especially in the wintertime, to clean out the feeder during every shift because the materials in the wintertime had a tendency to cling around the top of the feeder.

While there is no doubt in my mind that a person with secure footing could step up a distance of 2 feet, or 2-1/2 feet if you include the angle into the control booth that was discussed by Inspector Quinn, the fact remains that anyone getting out of the feeder has to do so by standing on top of the grizzley and, as I have indicated in my findings, his footing would not be very stable.

It is undoubtedly true that Mr. Whalen had been down in that feeder and had cleaned in it for many years because he worked for the company from February 4, 1970, until his death on January 25, 1979. Nevertheless, the evidence shows that without any handhold or anything to assist a person who was stepping up out of the feeder, there was certainly a hazard involved in not having any facilities whatever to assist a person coming out of the feeder. Therefore, I find that a violation of section 56.11-1 occurred because a safe means of access into and out of the feeder had not been provided.

Having found that a violation occurred, it is necessary for me to assess a penalty based on the six criteria.

The first criterion is the size of respondent's business. As to that matter, I have indicated in paragraph one of my findings that the company had total man-hours of operation of 163,693. That places the company in a moderate range of size. Therefore, any civil penalty to be assessed in this case will be or should be in a moderate range of magnitude, insofar as the size of respondent's business is considered as one of the criteria.

There was introduced with respect to the criterion of history of previous violations Exhibit No. 5. That exhibit shows that there have been two previous violations of section 56.11-1 by the company. It has always been my practice to increase a penalty otherwise assessable under the other five criteria by a specific amount if I find existence of an unfavorable history of previous violations. Exhibit No. 5 shows that two previous violations occurred sometime between January 27, 1977, and January 26, 1979. I find that two violations in that length of time should be considered as somewhat unfavorable and therefore whatever penalty is assessed in this case will be increased by $50 under the criterion of history of previous violations.

As to the criterion of the operator's ability to continue in business, there was no testimony given on that subject. The former Board of Mine Operations Appeals held in Buffalo Mining Company, 2 IBMA 226 (1973), and in Associated Drilling, Inc., 3 IBMA 164 (1974), that if a company puts on no evidence showing its financial condition, that a judge may presume payment of penalties would not cause it to discontinue in business. Therefore, I find that payment of penalties will not cause A. H. Smith Stone Company to discontinue in business.

The next criterion to be considered is the question of whether the operator demonstrated a good faith effort to achieve rapid compliance after the citation was written. The inspector terminated the citation on January 30, 1979.

The citation was written on January 26, 1979. He has indicated that he felt the company showed a normal good faith effort to achieve rapid compliance. I find that the evidence supports that conclusion. When I find that a company has made a normal good faith effort to achieve compliance, I neither increase nor decrease a penalty otherwise assessable under the other criteria.

The remaining two criteria, that is, gravity and negligence, are the ones that affect the penalty the most severely. The first consideration is the degree of negligence involved in this particular violation. I think in connection with that criterion, it is worthwhile to note that the inspector had made a previous examination of the crusher at the Louisa Mill and had not noticed this particular hazard. I can understand why an inspector would not see everything that might be hazardous around the crusher on his first inspection. The inspector did indicate that he had been in this part of the facility and it did not occur to him at that time that this was a particularly hazardous area and he did not write a citation for a violation of section 56.11-1 at that time.

Nevertheless, when one does examine the area of the feeder from the standpoint of the photographs which I have discussed in my findings, one reaches the inescapable conclusion that the operator was at least guilty of a normal amount of negligence in not having put any kind of provisions here for a person to grab when he is trying to get in or out of the feeder, particularly since Mr. Christopher has indicated the feeder has to be cleaned out rather constantly during cold weather. Therefore, I find that there is a moderate amount of negligence involved in this case.

The final criterion I have to consider is the question of gravity. Gravity gets back to the question of whether the failure to provide a safe means of egress, specifically a step and a handhold for getting up out of the feeder, was the direct cause of the person's death in this instance. In a general situation, the question would be how serious a fall from the side of this feeder would normally be. The difficulty with making that finding in this case is associated with the fact that there was no eyewitness who saw Mr. Whalen fall, if he did fall, and there is no one who can say for certain that the medication he was taking had no bearing upon the fact that he was found in the crusher.

The inspector and Mr. Christopher have been unable to explain satisfactorily why a person, assuming he did slip in trying to get out of the feeder, would not only have fallen backwards but also would have further slid into the opening to the crusher. There was a distance of at least a couple of feet from the place where he would have fallen to the point where he would have started down into the crusher.

Another part of the problem in assessing gravity in this instance gets to the fact that when Mr. Christopher was talking to Mr. Whalen at 3:50 p.m., the feeder was not running. When Mr. Christopher next came back to the feeder, it still was not running but all the material that had been thrown down by Mr. Whalen onto the feeder had been transported by the feeder into the crusher and the feeder was empty of any material.

The foregoing facts support a conclusion to the effect that Mr. Whalen at least successfully got out of the feeder and turned it on in order to eliminate the materials that were in it. Inspector Quinn's belief that Mr. Whalen slipped while trying to get out of the feeder and fell backwards and rolled into the crusher, is really not supported by the facts because, once Mr. Whalen got out of the feeder and turned it on, there is no reason that we know of, based on the facts in this case, that he would have gotten back down into the feeder. We simply do not have any evidence to show for certain that failure to have a step and a handhold for a person to come out of the feeder was the direct cause of Mr. Whalen's death in this case.

Since we do not have any way to show the exact cause of death, and the inspector's accident report, Exhibit F, so indicates on page three, I can only find on the evidence in this case that the violation was moderately serious and would not normally be expected to result in a person's death.

There is one aspect of the evidence which does make this feeder and its lack of facilities to help a person get out of it serious, and that is, up until this accident occurred, Mr. Whalen was cleaning out the edges of the feeder while keeping the crusher in operation. That practice meant if anyone should fall into the crusher while cleaning out the feeder, his death was more likely than if the crusher had not been operating.

According to Mr. Christopher, after the accident, the company has discontinued that practice and now turns off both the feeder and the crusher at the time that a person is down in the feeder cleaning it out.

At the time this particular accident occurred, the company was engaging in a kind of operation which was less safety-oriented than it is now.

The lack of a means of egress, a safe means of egress on January 25, 1979, was more serious than it would be today when neither the crusher nor the feeder is operating, but on January 25, 1979, the crusher was operating even though the feeder was not.

For that reason, I find that the evidence supports a conclusion that the violation was moderately serious.

In summary, since we have a company which operates a medium-sized business, and since we have a good faith effort to achieve compliance and a moderate amount of negligence and a moderate amount of gravity, I believe a penalty of $400 should be assessed, to which there should be added $50 under the criterion of history of previous violations, so that the total penalty in this case should be $450.

WHEREFORE, it is ordered:

Within 30 days from the date of this decision, A. H. Smith Stone Company shall pay a penalty of $450.00 for the violation of section 56.11-1 charged in Citation No. 301536 dated January 26, 1979.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

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A. H. Smith Stone Company, Attention: A. H. Smith, Jr., and
Wheeler B. Green III, Branchville, MD 20740 (Certified Mail)

DEC 2 1980

GEX COLORADO, INCORPORATED, Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	NOTICE OF CONTEST DOCKET NO. WEST 80-327-R Citation No. 0786929 Roadside Mine

DECISION

Appearances:

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for Respondent

Ann M. Noble, Esq., Office of Henry Mahlman, Regional Solicitor,
United States Department of Labor,
1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294
for Respondent

Before: Judge John J. Morris

STATEMENT OF THE CASE

Contestant, GEX Colorado, Incorporated, (GEX), seeks damages, expenses, and costs against the Secretary of Labor. It alleges that it suffered such damage as a result of the improper issuance of Citation No. 786929 by a mine safety inspector of the Federal Mine Safety and Health Administration (MSHA). The citation was originally issued under the authority of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, *et seq*.

PROCEDURAL BACKGROUND

At a hearing on May 20, 1980 in Grand Junction, Colorado in a case [1] involving the above parties, the representative of GEX presented a copy of its notice of contest of MSHA citation No. 786929.

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[1] GEX Colorado Incorporated, Contestant, vs. Secretary of Labor, Mine Safety and Health Administration (MSHA), Respondent, Docket No. WEST 80-306-R, decision issued June 9, 1980.

The parties indicated the citation had been withdrawn before the hearing. (Tr. 7-8). The Commission file was subsequently assigned to the trial judge.

In reply to a Commission order on May 29, 1980, GEX indicated its intention to seek the additional relief as prayed in its notice of contest although the citation had been vacated.

> GEX's additional relief seeks: general damages according to proof; punitive and exemplary compensation; costs of maintaining the action; incidental expenses according to proof; other and further relief as the Commission deems proper.

GEX expressly states that any and all compensation awarded to it will be used to offset any future valid assessed penalties.

Subsequent to the events of May 20, 1980, the Commission Judge stated he would rule on the issue of whether the GEX notice of contest, in its present posture, states a claim upon which relief can be granted. If affirmative, the case would be set for an evidentiary hearing. If negative the notice of contest would be dismissed. (Order, July 11, 1980).

The parties filed briefs in support of their respective positions.

The Secretary contends that the Federal Mine Safety and Health Review Commission does not have jurisdiction to consider the merits of GEX's claim because the citation was withdrawn by MSHA prior to the time that GEX filed its notice of contest. Additionally, MSHA asserts that the doctrine of sovereign immunity bars recovery on GEX's claim. The Secretary also has moved to dismiss the case on the ground that GEX has failed to state a claim upon which relief can be granted.

ISSUE

In a notice of contest under Section 105(d) of the Federal Mine Safety and Health Act, contestant seeks damages against the Secretary of Labor. Prior to the filing of the notice of contest the Secretary withdrew his citation against contestant. The issue is whether the Review Commission has jurisdiction to consider the contest.

FINDINGS OF FACT

The facts as shown by the file and admissions are as follows:

1. A federal mine inspector issued Citation 786929 to GEX on April 29, 1980.

2. The citation charged GEX with violating 30 CFR 75. 1704 [2] by failing to provide substantial fire doors in the main intake portal. The inspector gave GEX an extension until May 19, 1980 to abate the condition.

3. On May 15, 1980, after incurring some abatement expense, GEX was advised by the inspector that MSHA had withdrawn the citation as "being written in error" (Tr. 6, notice of contest.)

4. The notice of contest was lodged with the Review Commission on May 23, 1980.

DISCUSSION

For the reasons hereafter stated the notice of contest is dismissed with prejudice.

The legal matters over which the Commission has jurisdiction are limited to those set forth in the Federal Mine Safety and Health Review Act, 30 U.S.C. 801 et seq. A mine operator is afforded an opportunity for a hearing on its contest of a citation, a withdrawal order, the length of an abatement period, or the penalty assessed by the Secretary,30 U.S.C. 815(d). There are additional opportunities for a hearing that are not relevant here but there is no provision in the Act for a suit against the Secretary of Labor for damages sustained as a result of the improper issuance of a citation. A contest of a citation involves a dispute as to the validity of the citation. It cannot be construed so as to provide for a hearing on a claim for consequential damages suffered by the operator.

GEX contends that the grant of authority in 30 U.S.C. 815(d) giving the Commission the power to order "other appropriate relief", is to be interpreted to allow consideration of GEX's claims for a set off. I disagree. This provision refers to the authority of the Commission to provide relief to the parties who have brought before the Commission matters within its jurisdiction. Since the citation which gave rise to the claimed damages had been withdrawn prior to the time GEX filed its notice of contest there is no substantive matter in the notice that is cognizable by the Commission.

2/ § 75.1704 Escapeways. [Statutory Provisions]. Except as provided in § 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

GEX also cites *North American Coal Corp.*, 3 IBMA 93 (1974) as support for its theory that it is entitled to an award of damages and to set off such claim against any future penalties. *North American* is distinguishable from the present case. There the Interior Board of Mine Operations Appeals ruled that the loss in production incurred as a result of a vacated withdrawal order could be considered as a mitigating factor in the assessment of the penalty *for the violation which was the subject of the withdrawal order*. The loss was to be considered in the same manner as the other statutory criteria required to be evaluated in the calculation of a penalty. It was within the discretion of the judge to determine how much, if any, the penalty should be reduced because of the economic loss.

The Board did not rule that damages could be assessed against the United States and set off against any future civil penalties. The reduction in the fine was allowed because the economic loss plus the reduced penalty was believed by the Board to be a sufficient deterrent against future infractions. The ruling was limited to instances where the condition which gave rise to the improper withdrawal order and subsequent loss in production is the same condition for which the civil penalty is assessed. Cf. *Climax Molybdenum Company v. Secretary of Labor et al DENV 79-102-M, October 1980.*

In the present case, there is no penalty assessment at issue. The ultimate remedy requested by GEX, if granted, would allow them to violate the Act with impunity until any money damages were satisfied. This would contravene the intention of Congress in providing for the assessment of a penalty.

The intent of Congress on this point appears in the legislative history.

> To be successful in the objective of including effective and meaningful compliance, a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance. Senate Report No. 95-181, 95th Cong., 1st Sess. 41 (1977).

For the reasons stated, I have determined that the Review Commission does not have jurisdiction to consider contestant's claim for damages. Accordingly, it is not necessary to consider the Secretary of Labor's arguments based on sovereign immunity.[3]

CONCLUSIONS OF LAW

The Commission lacks jurisdiction to consider this case because the citation was withdrawn before the notice of contest was filed. A procedure awarding damages in such a situation would be inconsistent with the Act. For these reasons I find that Contestant has failed to state a claim upon which relief can be granted.

---

[3] For a companion case discussing the doctrine of soverign immunity see GEX Colorado vs. Secretary of Labor, WEST 80-328-R.

ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

The notice of contest is dismissed with prejudice.

John J. Morris

John J. Morris
Administrative Law Judge

Distribution:

Robert J. Lesnick, Esq., Office of Tedrick A. Housh, Jr.
Regional Solicitor, United States Department of Labor
Room 2106, 911 Walnut Street, Kansas City, Missouri 64106

Ann M. Noble, Esq., Office of Henry Mahlman, Regional Solicitor
U. S. Department of Labor,
1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294

Richard L. Fanyo, Esq., Welborn, Dufford, Cook & Brown, Attorneys at Law
1100 United Bank Center, Denver, Colorado 80290

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

DEC 2 1980

SECRETARY OF LABOR, MINE SAFETY AND
HEALTH ADMINISTRATION (MSHA),

Petitioner,

v.

GEX COLORADO, INC.,

Respondent.

CIVIL PENALTY ACTION

DOCKET NO. WEST 79-28-M

ASSESSMENT CONTROL NO.
05-00281-03012

ROADSIDE MINE

APPEARANCES:

Ann M. Noble, Esq., Office of Henry C. Mahlman, Associate Regional Solicitor, United States Department of Labor, Denver, Colorado
for the Petitioner,

Curt Neumann, Assistant Safety Director, appearing pro se, Grand Junction, Colorado
for the Respondent.

Before: Judge John J. Morris

DECISION

In this civil penalty proceedings Petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that respondent, GEX Colorado, Inc. (GEX), violated regulations promulgated under the authority of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Pursuant to notice, a hearing on the merits was held in Grand Junction, Colorado on May 20, 1980.

The parties waived their right to file post trial briefs.

ISSUES

The issues are whether GEX violated the standards.

CITATION 242465

This citation alleges a violation of 30 C.F.R. 75.302-4(a) [1]

The facts are uncontroverted.

1. MSHA Inspector Walter Blanc used a smoke tube test to determine the flow of the air current in the GEX mine (Tr. 5, 6, 10).

2. Air from the working face in the mine was being recirculated into the air intake entry and thus the air was again travelling to the working face (Tr. 4-5).

3. The recirculating air from the auxilliary fan was blowing under a line curtain instead of following the return air course (Tr. 5, 8, P5).

DISCUSSION

GEX contends the situation cited by the inspector was merely turbulent air which did not create a hazard. In addition, GEX asserts that MSHA failed in its burden of proof because the inspector did not follow the air to the working face (Tr. 90).

GEX's arguments lack merit. The inspector's testimony clearly establishes that a recirculation of air occurred. The regulation prohibits such a recirculation "at any time". The regulation in its present form presumes the existence of a hazard.

Concerning the second argument, it is not necessary for the MSHA inspector to follow the air to the working face. The movement of the recirculated air into the intake air entry is sufficient to establish the violation of 30 C.F.R. 75.302-4(a). Once it has entered the intake air corridor, the air can only be drawn to the working face (Exhibit P5). The citation should be affirmed.

In view of the statutory criteria [2], I consider the proposed civil penalty of $114.00 to be appropriate.

1/ § 75.302-4 Auxiliary fans and tubing.

> (a) The fan shall be of a permissible type, maintained in permissible condition, so located and operated to avoid any recirculation of air at any time, and inspected frequently by a certified person when in use.

2/ 30 USC 820(i)

CITATION 242467

This citation alleges a violation of 30 C.F.R. 75.403.

The parties by stipulation propose an amendment of the civil penalty and respondent agrees to withdraw its notice of contest.

An analysis of the supporting documentation indicates that the proposed settlement is warranted in view of the statutory criteria, 30 USC 820(i). Accordingly this citation and the proposed civil penalty, as amended, in the amount of $75.00 should be affirmed.

CITATION 242662

This citation alleges a violation of 30 C.F.R. 75.316 [3].

The facts are conflicting and I find the following facts to be credible.

1. MSHA Inspector Matthew Biondich, using his anemometer, was unable to measure the air velocity in the mine (Tr. 33-38).

2. The stoppings in the mine were leaking "pretty bad" (Tr. 35).

3. Three smoke readings indicated an air velocity of 7025 cfm (cubic feet per minute). (Tr. 39-40).

4. After the stoppings were repaired, the velocity increased to 20,475 cfm (Tr. 44).

5. According to GEX's ventilation plan, 16,000 cfm should be maintained (Exhibit P-3).

Respondent's two fold argument is that the decrease in air velocity was due to necessary ventilation changes when moving from one side of the belt line to the other. Further, respondent asserts it cannot be expected to maintain air velocity in the last open cross cut.

3/ § 75.316 Ventilation system and methane and dust control plan.
[STATUTORY PROVISIONS]

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form on or before June 28, 1970. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every 6 months.

I reject respondent's arguments. While a conflict exists as to the amount of the air velocity in this section of the mine, I find this to be basically a matter of expert testimony. Respondent conceded the expertise of the MSHA inspectors (Tr. 32-33).

Respondent's defenses cannot prevail since its ventilation plan requires air velocity at all places in excess of the 7025 cfm measured by the inspector.

This citation should be affirmed and in view of the statutory criteria[4], I consider the proposed civil penalty of $180.00 to be appropriate.

ORDER

Based on the foregoing findings of fact, conclusions of law, and stipulation I hereby enter the following order:

1. Citation 242465 and the proposed civil penalty of $114.00 are affirmed.

2. Citation 242467 and the proposed civil penalty, as amended, in the amount of $75.00 are affirmed.

3. Citation 242662 and the proposed civil penalty of $180.00 are affirmed.

John J Morris

John J. Morris
Administrative Law Judge

Distribution:

Ann M. Noble, Esq., Office of the Solicitor, United States Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294

Mr. Curt Neumann, Acting Safety Director, GEX Colorado, Inc., P. O. Box W, Palisade, CO 81526

4/ 30 USC 820(i)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

DEC 2 1980

GEX COLORADO, INCORPORATED,
Contestant,
v.
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),
Respondent.

NOTICE OF CONTEST

DOCKET NO. WEST 80-328-R
Citation No. 0786890

Roadside Mine

DECISION

Appearances:

Richard L. Fanyo, Esq., Welborn, Dufford, Cook & Brown
1100 United Bank Center, Denver, Colorado 80290
for Contestant,

Robert J. Lesnick, Esq., Office of Tedrick A. Housh, Jr.,
Regional Solicitor, United States Department of Labor
Room 2106, 911 Walnut Street, Kansas City, Missouri 64106
for Respondent

Ann M. Noble, Esq., Office of Henry Mahlman, Regional Solicitor,
United States Department of Labor,
1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294
for Respondent

Before: Judge John J. Morris

STATEMENT OF THE CASE

Contestant, GEX Colorado, Incorporated, (GEX), seeks damages, expenses, and costs against the Secretary of Labor. It alleges that it suffered such damage as a result of the improper issuance of Citation No. 786890 by a mine safety inspector of the Federal Mine Safety and Health Administration (MSHA). The citation was originally issued under the authority of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq.

PROCEDURAL BACKGROUND

At a hearing on May 20, 1980 in Grand Junction, Colorado in a case[1] involving the above parties, the representative of GEX presented a copy of its notice of contest of MSHA citation No. 786890.

1/ GEX Colorado Incorporated, Contestant, vs. Secretary of Labor, Mine Safety and Health Administration (MSHA), Respondent, Docket No. WEST 80-306-R, decision issued June 9, 1980.

Counsel for the Secretary of Labor moved to withdraw the citation, (Tr. 7). The trial judge indicated he did not have the Commission file but he would grant the motion to vacate (Tr. 10). The file was subsequently assigned to the trial judge.

In reply to a Commission order on May 29, 1980, GEX indicated its intention to seek the additional relief as prayed in its notice of contest although the citation had been vacated.

> GEX's additional relief seeks: general damages according to proof; punitive and exemplary compensation; costs of maintaining the action; incidental expenses according to proof; other and further relief as the Commission deems proper.

GEX expressly states that any and all compensation awarded to it will be used to offset any future valid assessed penalties.

Subsequent to the events of May 20, 1980, the Commission Judge stated he would rule on the issue of whether the GEX notice of contest, in its present posture, states a claim upon which relief can be granted. If affirmative, the case would be set for an evidentiary hearing. If negative the notice of contest would be dismissed. (Order, July 11, 1980).

The parties filed briefs in support of their respective positions.

The Secretary contends that the doctrine of sovereign immunity bars recovery on GEX's claim. He also has moved for the dismissal of the case on the ground that GEX has failed to state a claim upon which relief can be granted.

ISSUE

The issue raised is whether contestant, GEX, can seek damages against the Secretary of Labor for an allegedly improper issuance of a citation.

FINDINGS OF FACT

The facts as shown by the file and admissions are as follows:

1. A federal mine inspector issued Citation 786890 to GEX on May 15, 1980.

2. The citation charged GEX with violating 30 CFR 75.503 [2] by failing to properly maintain its roof bolting machine. Specifically, flat washers were used between the face of the lock washers and the cover lid bolts on the main controller compartment. (Citation, Notice of Contest, ¶ 4).

3. The GEX notice of contest was presented [3] to the Review Commission Judge during a hearing on an unrelated case involving the same parties.

4. At the above hearing the Secretary moved to vacate Citation 786890. The motion to vacate was granted (Tr. 7, 10).

DISCUSSION

For the reasons hereafter stated the notice of contest is dismissed with prejudice.

The Secretary is correct in his view that the doctrine of sovereign immunity bars GEX's claim. There are a myriad of cases holding that the United States "is immune from suit save as it consents to be sued . . and the terms of its consent to be sued in any court define the court's jurisdiction to entertain the suit." United States v. Testan 424 U.S. 392 (1976). Contestant is not entitled to money damages without a waiver of sovereign immunity, and the Federal Mine Safety and Health Act of 1977 contains no such waiver.

A mine operator is provided relief from improper actions of the Secretary through the vacation or modification of a citation, penalty, order of withdrawal, or abatement period. Administrative and judicial review of any action of the Secretary is allowed but the remedies available do not include monetary or exemplary damages.

2/ § 75.503 Permissible electric face equipment; maintenance. [Statutory Provisions] The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine.

3/ No party questions the propriety of the service of the notice of contest under these circumstances, and that issue is not addressed in this decision.

GEX contends that the grant of authority in 30 U.S.C. 815(d), giving the Commission the power to order "other appropriate relief", is to be broadly interpreted to allow consideration of GEX's claims for a set off. I disagree. The consent to be sued must be "unequivocally" expressed in the statute. Testan, supra. "Other appropriate relief" cannot be interpreted as an express waiver of sovereign immunity.

GEX also cites North American Coal Corp., 3 IBMA 93 (1974) as support for its theory that it is entitled to an award of damages which would be set off against any future penalties. North American is distinguishable from the present case. There the Interior Board of Mine Operations Appeals ruled that the loss in production incurred as a result of a vacated withdrawal order could be considered as a mitigating factor in the assessment of the penalty for the violation which was the subject of the withdrawal order. The loss was to be considered in the same manner as the other statutory criteria required to be evaluated in the calculation of a penalty. It was within the discretion of the judge to determine how much, if any, the penalty should be reduced because of the economic loss.

The Board did not rule that damages could be assessed against the United States and set off against any future civil penalties. The reduction in the fine was allowed because the economic loss plus the reduced penalty was believed by the Board to be a sufficient deterrent against future infractions. The ruling was limited to instances where the condition which gave rise to the improper withdrawal order and subsequent loss in production is the same condition for which the civil penalty is assessed. Cf. Climax Molybdenum Company v. Secretary of Labor et al DENV 79-102-M, October 1980.

In the present case, there is no penalty assessment at issue. The ultimate set off remedy requested by GEX, if granted, would allow them to violate the Act with impunity until any money damages were satisfied. This would contravene the intention of Congress in providing for the assessment of a penalty.

The intent of Congress on this point appears in the legislative history.

> To be successful in the objective of including effective and meaningful compliance, a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance. Senate Report No. 95-181, 95th Cong., 1st Sess. 41 (1977).

CONCLUSIONS OF LAW

The Commission lacks jurisdiction to consider a claim for damages against the Secretary of Labor since the Federal Mine Safety and Health Act of 1977 does not waive the sovereign immunity of the United States.
A procedure awarding damages for a future set off in such a situation would be inconsistent with the Act. For these reasons I find that contestant has failed to state a claim upon which relief can be granted.

ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

The notice of contest is dismissed with prejudice.

John J. Morris

John J. Morris
Administrative Law Judge

Distribution:

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Regional Solicitor, United States Department of Labor
Room 2106, 911 Walnut Street, Kansas City, Missouri 64106

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U. S. Department of Labor,
1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294

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1100 United Bank Center, Denver, Colorado 80290

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

DEC 2 1980

SECRETARY OF LABOR	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. BARB 79-319-P
Petitioner	:	A.O. No. 31-00136-05006R
	:	
v.	:	Docket No. SE 79-56-M
	:	A.O. No. 31-00136-05007
CAROLINA STALITE COMPANY,	:	
Respondent	:	Docket No. SE 79-91-M
	:	A.O. No. 31-00136-05001
	:	
	:	Docket No. SE 79-92-M
	:	A.O. No. 31-00136-05003
	:	
	:	Docket No. SE 79-93-M
	:	A.O. No. 31-00136-05004
	:	
	:	Docket No. SE 79-94-M
	:	A.O. No. 31-00136-05002
	:	
	:	Docket No. SE 79-95-M
	:	A.O. No. 31-00136-05005
	:	
	:	Docket No. SE 79-85-M
	:	A.O. No. 31-00136-05008
	:	
	:	Docket No. SE 79-87-M
	:	A.O. No. 31-00136-05009
	:	
	:	Docket No. SE 79-114-M
	:	A.O. No. 31-00136-05010 H
	:	
	:	Docket No. SE 80-35-M
	:	A.O. No. 31-00136-05012
	:	
	:	Docket No. SE 80-37-M
	:	A.O. No. 31-00136-05013
	:	
	:	Docket No. SE 80-44-M
	:	A.O. No. 31-00136-05014
	:	
	:	Stalite Mill

DECISION AND ORDER

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the petitioner;
William C. Kluttz, Jr., Esq., Salisbury, North Carolina, for the respondent.

Before: Judge Kennedy

These 13 penalty cases involve 133 charges of violations of the Mine Act and the mandatory safety standards for sand, gravel and crushed stone operations set forth in 30 C.F.R. Part 56. In all these cases, the operator filed an answer in which it (1) generally denied liability, (2) specifically denied subject matter jurisdiction, (3) moved to suppress evidence, (4) challenged the standards for vagueness, and (5) claimed the charges were the result of arbitrary and capricious action.

On November 28, 1979, respondent filed a motion for summary decision and to dismiss based on its jurisdictional and constitutional challenges. After briefing and oral argument, the motion was denied by Decision and Order of April 14, 1980, a copy of which is attached hereto and incorporated herein.

Thereafter, in the interest of a just, speedy and inexpensive disposition, the parties stipulated to waive an evidentiary hearing and agreed to submit all of the violations for decision on the record of their written submissions, leaving to the judgment, expertise and discretion of the trial judge the resolution of factual conflicts and the determination of the amount of the penalties warranted. 5 U.S.C. § 556(d); 30 U.S.C. §§ 110(i), (k), 113(d). The stipulation originally proposed that in addition to deciding the merits the trial judge would rule on the void for vagueness claim without briefing or argument. When the trial judge declined to accept this provision, respondent withdrew this challenge. The stipulation as filed on August 11, 1980 and amended on October 30, 1980, the trial judge finds is acceptable.

The claim that the charges are arbitrary and capricious is without merit. The evidence shows that most of the violations did, in fact, occur. Furthermore, the undisputed evidence as to the conditions observed by the inspector established probable cause to believe that at the time of issuance of the citations and orders the violations charged existed. There is no evidence that the enforcement action taken was so selective as to establish an abuse of discretion or so grossly erroneous as to imply bad faith. Accordingly, the defense of arbitrary and capricious action is denied.

The record for decision in these cases consists of the citations and orders, the inspector's statements and contemporaneous notes, the operator's statements in defense or in mitigation of the gravity and negligence (Exhibit "B" to the stipulation as amended), photographs submitted by respondent, sketches submitted by petitioner, and the parties' prehearing submissions.

After a careful review of the record and based on an independent evaluation and de novo review of the circumstances of each violation, I find, that except as noted below, the conditions and practices observed and set forth in the citations and orders were violations of the mandatory safety standards cited. Appendix "A" attached hereto and made a part hereof, supplemented where appropriate with the additional discussion contained in Appendix "B" hereto, contains my determinations with respect to gravity, negligence, and, based on my consideration of the other criteria applicable to the assessment of penalties, findings as to the amount of the penalties warranted for each violation found. For the reasons advanced by the operator, and after careful consideration of the record considered as a whole, including the physical circumstances shown in the photographs and sketches, I find the violations indicated in Appendix "A" as "vacated" are deficient as a matter of fact and law, and that these violations did not, in fact, occur.

The total amount of the penalties found warranted for the 103 violations found is $14,542.00. Accordingly, it is ORDERED that on or before Monday, December 29, 1980, the operator pay the amount of the penalties assessed, $14,542.00, and that subject to payment the captioned matters be, and hereby are, DISMISSED.

Joseph B. Kennedy

Joseph B. Kennedy
Administrative Law Judge

Attachments

Distribution:

Darryl A. Stewart, Esq., U.S. Department of Labor, Office of the Solicitor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

William C. Kluttz, Jr., Esq., Kluttz and Hamlin, 507 West Innes Street, P.O. Drawer 1617, Salisbury, North Carolina 28144 (Certified Mail)

APPENDIX A

Docket No.	Citation/Order No.	Standard	Gravity	Negligence	Penalty
BARB 79-319	104393	§103(a)	*Serious	Intentional	$ 500
SE 79-56	105187	56.14-6	Low Risk	No Negligence	50
	105190	56.14-1	Vacated - protected by location		
	105191	56.9-2	High Risk	High degree of ordinary	500
	105192	56.9-2	High Risk	High degree of ordinary	500
	105193	56.14-6	Vacated - protected by location		
	105195	56.11-12	Moderate Risk	Ordinary	125
	105196	56.14-1	Moderate Risk	Ordinary	125
	105567	56.4-33	High Risk	Ordinary	175
	105568	56.4-4	High Risk	Ordinary	175
	105569	56.12-20	Vacated - area dry, no shock hazard existed		
	105570	56.12-30	Low Risk	Ordinary	75
	105572	56.14-6	Vacated - protected by location		
	105573	56.14-6	Vacated - protected by location, machinery not in operation		
	105574	56.14-6	Vacated - protected by location, machinery not in operation		
	105575	56.11-2	Low Risk	Ordinary	75
	105576	56.14-6	Low Risk	Ordinary	75
	105577	56.11-2	Low Risk	Ordinary	75
79-91	104395	56.16-5	High Risk	Ordinary	150
	104397	56.14-8(b)	Moderate Risk	Ordinary	100
	104398	56.12-8	Low Risk	Ordinary	75
	104399	56.12-32	Low Risk	Ordinary	75
	104650	56.15-5	High Risk	High degree of ordinary	300

*See Appendix B

APPENDIX A

Docket No.	Citation/Order No.	Standard	Gravity	Negligence	Penalty
79-91 (cont.)	104651	56.9-3	Extremely Serious (imminent danger)	Gross	$ 1000
	104687	56.9-3	Extremely Serious (imminent danger)	Gross	1000
79-92	104618	56.14-1	Vacated - protected by barrier and location		
	104619	56.14-1	Vacated - protected by barrier and location		
	104620	56.14-1	Vacated - per MSHA Management Letter No. 80-61		
	104628	56.14-1	Low Risk	No negligence	50
	104629	56.14-1	Low Risk	No negligence	50
	104630	56.9-7	Low Risk	Ordinary	75
	104631	56.14-1	Vacated - protected by location		
	104632	56.11-13	Low Risk	No negligence	50
	104633	56.14-2	Low Risk	No negligence	50
	104634	56.14-1	Vacated - protected by location		
	104635	56.14-1	Non-serious	No negligence	50
	104637	56.14-1	Vacated - protected by location		
	104638	56.14-1	Low Risk	Ordinary	75
	104639	56.14-1	Low Risk	Ordinary	75
	104640	56.14-1	Vacated - protected by location		
	104641	56.14-1	Vacated - protected by location		
	104642	56.14-1	High Risk	Ordinary	150
	104643	56.14-1	Vacated - per MSHA Management Letter No. 80-61		
	104644	56.14-1	Low Risk	Ordinary	75
	104645	56.11-2	Low Risk	Ordinary	75

APPENDIX A

Docket No.	Citation/Order No.	Standard	Gravity	Negligence	Penalty
79-93	104646	56.14-1	Vacated - protected by barricade and location		
	104647	56.14-1	Low Risk	No negligence	50
	104648	56.14-1	Low Risk	No negligence	50
	104649	56.11-12	High Risk	Ordinary	150
	104661	56.14-1	Vacated - protected by location		
	104662	56.11-2	Low Risk	Ordinary	75
	104663	56.14-1	Low Risk	Ordinary	75
	104664	56.14-1	Low Risk	Ordinary	75
	104665	56.14-1	Low Risk	Ordinary	75
	104666	56.14-1	Vacated - protected by location		
	104667	56.14-1	Low Risk	No negligence	50
	104668	56.14-2	Low Risk	Ordinary	75
	104669	56.14-1	Low Risk	No negligence	50
	104670	56.14-1	Low Risk	Ordinary	75
	104671	50.20-1	No Risk	No fault	1
	104672	50.30(a)	No Risk	No fault	1
	104652	56.14-1	Low Risk	Ordinary	75
	104653	56.14-1	Low Risk	Ordinary	75
	104654	56.14-1	Low Risk	Ordinary	75
	104655	56.9-7	Low Risk	Ordinary	75
79-94	104394	56.4-2	Low Risk	Ordinary	30
	104396	56.4-24(c)	Vacated - extinguisher not discharged		
	104400	56.11-13	Low Risk	Ordinary	75
	104601	56.14-1	Low Risk	Ordinary	75
	104602	56.9-7	Low Risk	Ordinary	75
	104603	56.9-7	Low Risk	Ordinary	75
	104604	56.12-8	Low Risk	No negligence	30
	104605	56.11-1	Low Risk	Ordinary	75
	104606	56.14-1	Vacated - protected by barricade and location		

APPENDIX A

Docket No.	Citation/Order No.	Standard	Gravity	Negligence	Penalty
	104607	56.14-1	Vacated - protected by barricade and location		
	104608	56.14-1	Low Risk	Ordinary	75
	104609	56.14-1	Vacated - per MSHA Management Letter No. 80-61		
	104610	56.14-1	Vacated - protected by location		
	104611	56.9-22	High Risk	No negligence	75
	104612	56.14-1	Vacated - per MSHA Management Letter No. 80-61		
	104613	56.11-2	Serious	Ordinary	150
	104614	56.14-1	Vacated - protected by location		
	104615	56.11-2	Low Risk	Ordinary	75
	104616	56.14-1	Vacated - protected by location		
	104617	56.9-7	Low Risk	Ordinary	75
79-95	104656	56.14-1	Low Risk	Ordinary	75
	104657	56.14-1	Low Risk	Ordinary	75
	104658	56.14-1	Low Risk	Ordinary	75
	104659	56.14-1	Low Risk	No negligence	50
	104660	56.14-1	Low Risk	Ordinary	75
	104673	56.9-7	Low Risk	Ordinary	75
	104674	56.9-7	Low Risk	Ordinary	75
	104675	56.14-6	Moderate Risk	Ordinary	125
	104676	56.14-1	Low Risk	Ordinary	75
	104677	56.11-12	High Risk	Ordinary	150
	104678	56.14-1	Low Risk	No Negligence	50
	104679	56.12-32	Moderate Risk	Ordinary	75

APPENDIX A

Docket No.	Citation/Order No.	Standard	Gravity	Negligence	Penalty
	104680	56.14-1	Low Risk	No negligence	50
	104681	56.11-1	Low Risk	Ordinary	75
	104682	56.14-1	Vacated - protected by location		
	104683	56.14-1	Vacated - protected by location		
	104684	56.14-2	Low Risk	Ordinary	75
	104685	56.9-11	Low Risk	Ordinary	75
79-85	105188	56.11-2	Moderate Risk	Ordinary	100
	105189	56.11-2	Moderate Risk	Ordinary	100
	105194	56.11-2	Moderate Risk	Ordinary	100
	105198(a)	56.15-5	Extremely Serious (imminent danger)	Gross	1000
	105198(b)	56.12-16	Extremely Serious (imminent danger)	Ordinary	500
	105565	56.15-4	Vacated - condition did not occur, men wearing safety glasses		
	105571	56.14-1	Vacated - protected by location		
	105197	56.11-1	High Risk	Ordinary	125
79-87	105566	56.14-45	Very High Risk	High degree of ordinary	300
79-114	104453	56.15-5	*Extremely serious (imminent danger)	Gross	1500
80-35	104510	56.9-73	Low Risk	No negligence	30
	105556	56.14-1	High Risk	Ordinary	125
	105557	56.11-2	Low Risk	Ordinary	75
	105558	56.14-1	Low Risk	Ordinary	75

*See Appendix B

APPENDIX A

Docket No.	Citation/Order No.	Standard	Gravity	Negligence	Penalty
80-35 (cont.)	1055559	56.14-1	Low Risk	Ordinary	75
	105560	56.14-1	Low Risk	Ordinary	25
80-37	104511	56.14-1	Low Risk	Ordinary	75
	104512	56.11-12	High Risk	Ordinary	125
	105552	56.9-88	Low Risk	Ordinary	50
	105553	56.14-1	High Risk	Ordinary	125
	105554	56.14-1	High Risk	Ordinary	125
	105555	56.14-1	Low Risk	Ordinary	75
	104514	56.11-1	Low Risk	Ordinary	75
	104515	56.11-12	Low Risk	No negligence	50
	104516	56.11-2	Low Risk	Ordinary	75
80-44	104513	56.9-6	Low Risk	Ordinary	75
	104517	56.14-1	Low Risk	Ordinary	75
	104520	56.18-10	Low Risk	Ordinary	75
	106621	56.9-6	High Risk	Ordinary	125
	105522	56.17-1	High Risk	Ordinary	125
				TOTAL PENALTIES	$14,542

APPENDIX B

BARB 79-319-P

Citation No. 104393: The undisputed facts with regard to this violation are set forth in the attached decision and order of April 14, 1980. As discussed therein, section 103(a) of the Act provides a right of entry upon mine property for the purpose of conducting inspections for health and safety hazards. The operator contends, however, that a denial of entry is not a violation of the Act for which a civil penalty may be assessed. I disagree. Section 110(a) of the Act states that any operator who violates "a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty ..." Since section 103(a) provides the Secretary with a right of entry upon mine property, it also of necessity creates a duty on the part of the operator not to interfere with the exercise of that right. Interference with the right of entry by the operator is, therefore, a violation of section 103(a), and a civil penalty for that violation must be assessed. Accord, Waukesha Lime & Stone Co., 1 FMSHRC 512, 518 (June 5, 1979); Baker Coal Co., 2 FMSHRC 2626 (September 16, 1980).

With regard to the amount of the penalty warranted for the violation found, I note that the operator denied the inspector access to the mine knowing full well that the inspector was authorized to enter by the Act. I further note that the mine property had been inspected on numerous occasions pursuant to the warrantless inspection provisions of the Metal and Nonmetallic Mine Safety Act of 1966, and the operator was therefore familiar with the federal inspection authority. This was a serious violation in that it significantly lengthened the employees' exposure to dangerous conditions. Accordingly, and after considering the other statutory criteria, I conclude that a civil penalty in the amount of $500 is warranted for this violation.

SE 79-114-M

Imminent Danger Closure Order No. 104453: Thirty minutes after the operator's foreman had been warned against allowing workmen to work in high places without safety belts and lines, he was observed watching an employee standing twenty feet above the ground on a four-inch angle iron brace working on a chute from the silo to the Nordberg crusher. Because of the imminent hazard to life and limb, the inspector issued a section 107(a) imminent danger closure order.

No excuse for the foreman's disregard for safety was offered. Furthermore, there is no evidence that any disciplinary or other corrective action was taken by the operator with respect to either the foreman or the perpetrator of the violation. This indifference to the foreman's reckless participation in the violation reflects a lack of commitment to voluntary compliance by the operator and its supervisory management.

I find, therefore, that (1) the violation of 30 C.F.R. 56.15-5 charged did, in fact, occur, (2) the violation was extremely serious in that it exposed the miner involved to a potentially fatal fall onto structures below, and (3) the violation was the result of reckless indifference to safe operating practices. Accordingly, and after considering the other statutory criteria, I conclude that a civil penalty in the amount of $1500 is warranted for this violation.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
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APR 14 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. CAROLINA STALITE COMPANY, Respondent	Civil Penalty Proceedings Docket No. BARB 79-319-P A.O. No. 31-00136-05006R Docket No. SE 79-56-M A.O. No. 31-00136-05007 Docket No. SE 79-91-M A.O. No. 31-00136-05001 Docket No. SE 79-92-M A.O. No. 31-00136-05003 Docket No. SE 79-93-M A.O. No. 31-00136-05004 Docket No. SE 79-94-M A.O. No. 31-00136-05002 Docket No. SE 79-95-M A.O. No. 31-00136-05005 Docket No. SE 79-85-M A.O. No. 31-00136-05008 Docket No. SE 79-87-M A.O. No. 31-00136-05009 Docket No. SE 79-114-M A.O. No. 31-00136-05010 Docket No. SE 80-35-M A.O. No. 31-00136-05012 Docket No. SE 80-37-M A.O. No. 31-00136-05013 Docket No. SE 80-44-M A.O. No. 31-00136-05014 Stalite Mill

DECISION AND ORDER

Appearances: John H. O'Donnell, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; Lewis P. Hamlin, Jr., Esq., William C. Kluttz, Jr., Esq., Kluttz & Hamlin, Salisbury, North Carolina, for Respondent.

Before: Judge Kennedy

The operator has moved for summary decision and to dismiss the captioned petitions on the grounds that (1) its business is not subject to Mine Act jurisdiction, and (2) the evidence obtained during the warrantless inspections which resulted in the issuance of the 132 violations charged must be suppressed. I find the operator's business consists of mineral milling or mineral preparation within the meaning of section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1), and that the Act's provision for warrantless searches is constitutional.

I. Jurisdictional Claim

The contention that Stalite's operation is not a "coal or other mine" within the meaning of section 3(h)(1) of the Mine Act 1/ rests on the following:

1/ Section 3(h)(1), 30 U.S.C. § 802(h)(1), provides:

"For the purpose of this Act, the term 'coal or other mine' means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machine, tools, or other property including impoundments, retention dams, and tailing ponds, on the surface or underground, used in, to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the

The Carolina Stalite Company operates a plant in Gold Hill, North Carolina, producing a light-weight construction material called Stalite. [2] The raw material from which the product is made is slate purchased from a neighboring quarry. The quarry is owned and operated by an unrelated employer, Young Stone Company. Young Stone Company mines and crushes the slate and delivers it by conveyor to the premises of Carolina Stalite. The conveyors by which the slate is delivered are owned, operated, maintained, and controlled by Young Stone Company. Young Stone Company is subject to Mine Act jurisdiction, and is regularly inspected by MSHA. There is no corporate affiliation between Carolina Stalite and Young Stone, and no business relationship other than that of vendor and purchaser. Carolina Stalite heats the crushed slate in rotary kilns to approximately 2,000 degrees Fahrenheit which causes it to "bloat" and increase in volume transforming it into a light-weight material. The Stalite is later crushed and sized to fill customer requirements, and is shipped in interstate commerce by truck and rail for use primarily in the manufacture of light-weight concrete masonry blocks.

Section 3(h)(1) of the Mine Act defines "coal or other mine" as including, inter alia, "structures, facilities, equipment, machines, tools, or

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fn. 1 (continued)
work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment."

[2] Stalite is an unregistered trade name used by respondent.

other property * * * used in, or to be used in, the milling of * * * minerals, or the work of preparing * * * minerals." Section 3(h)(1) further states that: "[i]n making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners at one physical establishment." Thus, the dispositive question of jurisdictional fact is whether the Stalite operation is properly classified as mineral milling or preparation.

Since mineral milling or preparation is not specifically defined in the Act, the Mine Safety and Health Administration (MSHA) and the Occupational Safety and Health Administration (OSHA) have entered into an agreement by which they define their respective jurisdictions. 39 Fed. Reg. 27382, superceded by 44 Fed. Reg. 22827. Appendix A of the Interagency Agreement includes the following definition: "Milling is the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable constituents of the crude from the undesired contaminants with which it is associated."

Respondent's argument is that it separates no constituents of the crude from any contaminants with which it is associated and separates nothing from the material it purchases for manufacture. It merely purchases crushed stone from an unaffiliated quarry, heats that stone to cause it to "bloat," and thereafter crushes and sizes it to order. The operator concludes that since a separating or refining process is an essential element of milling it cannot be deemed to be engaged in milling.

Although this contention may have merit with respect to this definition of milling, 3/ it fails to address the question of whether the operator is engaged in mineral preparation within the meaning of the Act.

In this regard, the Interagency Agreement gives 18 specific examples of mineral milling or preparation processes considered to be included in Mine Act jurisdiction. One of these processes is "heat expansion" which is defined as follows: "Heat expansion is a process for upgrading material by sudden heating of the substance in a rotary kiln or sinter hearth to cause the material to bloat or expand to produce a lighter material per unit volume." Additionally, the Interagency Agreement defines "crushing" as "the process used to reduce the size of mined materials into smaller, relatively course particles," and "sizing" as "the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes."

These definitions taken together exactly describe the Stalite process. It can be concluded, therefore, that the Carolina Stalite Company is engaged

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3/ A Dictionary of Mining, Mineral and Related Terms (U.S. Bureau of Mines, 1968), page 707, defines milling as including "the grinding and crushing of ore * * * and preparation for market," and defines ore as including "a mineral of sufficient value as to quality and quantity which may be mined with profit." Id. at 772. These definitions taken together classify the Stalite process as milling. It should also be noted that the Stalite process is similar to that of cement plants utilizing rotary kilns and crushing and sizing equipment. Although cement plants also do not separate constituents of a crude from undesired contaminants, they are classified as mills and are subject to Mine Act jurisdiction.

in mineral processing within the jurisdiction of the Mine Safety Act if the definitions contained in the Interagency Agreement are in accord with the legislative intent.

The legislative history of the Act clearly contemplates that jurisdictional doubts be resolved in favor of Mine Act jurisdiction. The report of the Senate Committee on Human Resources states:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. 95-181, 95th Cong., 1st Sess. (May 16, 1977) at 14; Legislative History of the Mine Safety and Health Act, Committee Print at 602 (hereinafter cited as Leg. Hist.).

The operator contends, however, that the Secretary's designation of certain operations such as brick, clay pipe, refractory, and concrete product plants as being within OSHA jurisdiction while including the Stalite operation within MSHA jurisdiction is arbitrary and capricious, and constitutes an abuse of discretion. The operations listed in the Agreement as being within OSHA jurisdiction are, however, primarily manufacturing in nature and generally do not exclusively rely on such milling-related processes as heat expansion, crushing or sizing. Section B.4 of the Interagency Agreement states that "under section 3(h)(1), the scope of the term milling may be expanded to apply to mineral product manufacturing processes where these processes are related, technologically or geographically, to milling." In making this determination, the Agreement states that the following considerations will be taken into account:

> [T]he processes conducted at the facility, the relation of all processes at the facility to each other, the number of individuals employed in each process, and the expertise and enforcement capability of each agency with respect to the safety and health hazards associated with all the processes conducted at the facility. Id.

The Secretary asserts that the conversion of slate to a light-weight aggregate is recognized as mineral processing, and the exposure of employees to the safety and health hazards associated with these processes is the same regardless of whether the operation is free-standing or is directly associated with a mineral extraction process. MSHA and its predecessors have had years of experience inspecting mining and milling operations, and have had the opportunity to develop an expertise in the inspection of Carolina Stalite's operations during the 18 inspections of its plant carried out since 1971. Given these considerations, along with the fact that the Carolina Stalite operation is located directly adjacent to its stone quarry supplier which is also subject to MSHA jurisdiction, I cannot find that inclusion of respondent's operation within the coverage of the Mine Act is an abuse of discretion. 4/

4/ As a result of this determination, it is clear that Carolina Stalite's argument that 30 C.F.R. § 56.2 provides a restrictive definition of milling which is inapplicable to its operation is likewise without merit. That section provides that the word mill "includes any ore mill, sampling works, concentrator, and any crushing, grinding, or screening plant used at, and in connection with, an excavation or mine." The operator contends that the words "used at or in connection with, an excavation or mine" is limiting

This conclusion is in accord with Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589 (3rd Cir. 1979), cert. denied, No. 79-614 (January 7, 1980), which dealt with a closely analogous situation. There, the State of Pennsylvania dredged a river and deposited the material into a nearby basin. The operator purchased this material and through the use of a front-end loader and conveyor belts transported the material to its plant where, through a sink-and-float process, a low-grade fuel was separated from the sand and gravel. The court held that the operator was engaged in the preparation of minerals within the jurisdiction of the Mine Act, and that "the work of preparing coal or other minerals is included within the Act whether or not extraction is also being performed by the operator." 602 F.2d at 592.

Thus, I find that the Carolina Stalite Company's operation is properly subject to Mine Act jurisdiction, and the fact that it does not itself extract the minerals which it processes does not remove its employees from the Act's protection.

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fn. 4 (continued)
language which excludes the Stalite operation since it is independent of the neighboring quarrying operation. This construction cannot be accepted since to do so would limit the jurisdictional language of section 3(h)(1) which does not include the "in connection with" phrase. Thus, the 30 C.F.R. § 56.2 definition must be construed as being illustrative rather than exclusive. Accord, Readymix Sand & Gravel Company, WEST 79-66-M (December 5, 1979). It must also be noted that this provision was originally promulgated at 34 Fed. Reg. 12511 (July 31, 1969), pursuant to the Federal Metallic and Nonmetallic Mine Safety Act, P.L. 89-577, 80 Stat. 772, and is not reflective of the jurisdictional reach of the 1977 Mine Act.

II. Fourth Amendment Claim 5/

With respect to the assertion that the warrantless inspection of the Stalite plant was violative of the Fourth Amendment and the fruits of that inspection must be suppressed, the operator asserts and the Secretary does not dispute, the following material facts:

5/ Neither party has questioned the propriety of addressing the constitutional challenge. For years, it has been the conventional wisdom that an administrative agency is not competent to rule on constitutional challenges to the organic statute of the agency. See Weinberger v. Salfi, 422 U.S. 749 (1975); Johnson v. Robinson, 415 U.S. 361 (1974). This has led to the anomalous result that constitutional challenges raised for the first time on appeal have been dismissed for failure to exhaust the "available" administrative remedy, despite the fact that the agency refuses to rule on such challenges. See Marshall v. Able Contractors, 573 F.2d 1055, 1057 (10th Cir.), cert. denied, 439 U.S. 826 (1978). Increasingly, however, courts are beginning to recognize that important and difficult constitutional questions cannot be decided devoid of factual context, and that agency adjudicative procedures are uniquely suited to the factfinding necessary to the determination of constitutional issues. Marshall v. Babcock & Wilcox Company, No. 79-1641 (3rd Cir., November 16, 1979). Indeed, four circuits have held that constitutional challenges must be brought in the first instance before the agency in order to preserve the issue for appeal. In Re Worksite Inspection of Quality Products, 592 F.2d 611 (1st Cir. 1979); Bethlehem Steel Corporation v. OSHRC, No. 79-1040 (3rd Cir., October 15, 1979); Blocksom & Company v. Marshall, 582 F.3d 1122, 1124 (7th Cir. 1978); Marshall v. Able Contractors, supra. See also, Bituminous Coal Operators' Association v. Marshall, 82 F.R.D. 350, 353 (D.D.C. 1979), holding that the Mine Safety and Health Review Commission is authorized to decide "all matters in dispute" in cases before it. This comports with the requirement of 5 U.S.C. § 557(c)(A) that the agency decide "all the material issues of fact, law or discretion presented on the record * * *", as well as of section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1), which states that "No objection that has not been urged before the Commission shall be considered by the court . . ." Indeed, Congress specifically found that the provisions that "objections not raised before the Commission cannot be raised before a reviewing court are consistent with sound procedure and do not deny essential due process." Leg. Hist. at 637. See generally, Note, The Authority of Administrative Agencies to Consider the Constitutionality of Statutes, 90 Harvard Law Review 1682 (1977); Southern Pacific Transportation Co. v. Public Utilities Commission, 18 Cal. 3d 308, 556 P.2d 289 (1976).

On the morning of Tuesday, October 17, 1978, at approximately 9:00 a.m., Charles L. Blume, a Federal mine inspector, entered the Carolina Stalite Company office and requested entry to inspect the operation under the Mine Safety and Health Act of 1977. The company's assistant superintendent, Fred Drew, declined admittance to Mr. Blume because management had instructed him to refuse entry to MSHA inspectors. Mr. Blume returned again that afternoon, at which time the plant superintendent, Ben Ketchie, was present. Mr. Ketchie, citing the same instructions, also refused admittance to Inspector Blume, whereupon Mr. Blume, following the instructions contained in the MSHA Inspection Manual issued a section 104(a) citation alleging a violation of section 103(a) of the Mine Act for failure to admit him for the purpose of inspecting the plant. The time fixed for abatement was 4:00 p.m. that afternoon, but was extended overnight when the inspector did not return that day.

The following day, Wednesday, October 18, at approximately 9:00 a.m., Mr. Blume returned to the Carolina Stalite Company and informed Mr. Ketchie that unless entry was granted he would issue a section 104(b) closure order which would have the effect of immediately shutting the operation down. Inspector Blume delayed action to allow Mr. Ketchie time to call Allen Johnson, managing partner, and agreed to await his arrival before proceeding further.

With attorney Clarence Kluttz, Mr. Johnson arrived at the plant later that morning. At that time, Mr. Blume informed them that unless entry was allowed for the purpose of conducting an inspection, he would have to issue a closure order.

Mr. Kluttz asked if he could have 2 work days to familiarize himself with the provisions of the Mine Act. Mr. Blume refused this request. Mr. Kluttz called Mr. Blume's supervisor, Marvin Nichols, who also refused a further delay. At that time, the operator elected to cooperate and permit entry because of the threat of closure.

Arguing from these facts, the operator seeks a finding (1) that entry to the plant was nonconsensual and only granted as a result of the inspector's threat to issue a section 104(b) closure order, and (2) that the Fourth Amendment does not permit warrantless searches of this particular operation, and that the fruits of such nonconsensual searches must be suppressed.

I conclude that the existence of the operator's standing instructions regarding entry shows it had ample time to reflect on its policy before the inspector arrived, that the 24 plus hours allowed by the inspector for compliance after he arrived was reasonable and that the inspector's refusal and that of his supervisor to further extend the time for compliance was not under the circumstances an abuse of discretion.

Respondent urges that the inspector was not authorized to issue a section 104(a) citation or to threaten to issue a section 104(b) closure order citing violation of section 103(a) since the Act provides that where entry is denied the Secretary's only recourse is to seek an injunction in Federal district court pursuant to the provisions of section 108(a). The operator claims that the issuance of a section 104(b) order amounts to the imposition of a summary sanction not contemplated by the Act, which "provides for immediate judicial review by requiring the Secretary to secure an injunction in the district court if he is refused entry." Citing Marshall v. Stoudt's Ferry Preparation Company, supra at 594. 6/

Disposition of this claim depends on an analysis of the respective functions of sections 104 and 108 of the Act, and of the remedies available in the face of a closure order. Section 104(a) provides that whenever an inspector "believes that an operator * * * has violated this Act * * * he shall with reasonable promptness issue a citation to the operator." (Emphasis added.) Section 104(b) provides that "if a violation described in a citation * * * has not been totally abated * * * [and] the period of time for the abatement should not be further extended, he * * * shall promptly issue" a closure order. (Emphasis added.) Thus, the scheme of section 104 is to require inspectors to issue citations whenever they find a violation of the Act or the mandatory standards, and to issue closure orders whenever an operator fails or refuses to abate the violation. The inspector, after issuing the citation, informed the operator that a section 104(b) closure order would issue if the operator continued to refuse entry. The operator then permitted entry and the section 104(b) order never issued.

The operator maintains that the inspector had no authority to threaten the issuance of a closure order since section 108 requires the Secretary to

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6/ Regarding the "immediacy" of judicial review under section 108(a), it should be noted that some district courts have been notoriously slow in considering requests for injunctions following denials of entry. For example, the Eastern District of Wisconsin in Marshall v. Waukesha Lime & Stone, C.A. No. 79-C-114, denied a request for preliminary injunction on March 9, 1979, and has yet to hear the request for permanent injunction, and in Marshall v. Halquist Stone, C.A. No. 78-C-463, the preliminary injunction was denied on September 15, 1978, and the permanent injunction proceedings are still pending.

seek an injunction whenever entry is denied. Section 108(a)(1) merely provides, however, that "[t]he Secretary may institute a civil action for relief, including a permanent or temporary injunction * * * whenever such operator or his agent - (A) violates or fails to comply with any order or decision issued under this Act * * * [or] (C) refuses to admit such representatives to the * * * mine, [or] (D) refuses to permit the inspection of the * * * mine." (Emphasis added.) Thus, it is clear that the language of section 108 is permissive rather than mandatory in nature, and that the 1977 Mine Act contemplates a complementary scheme of administrative remedies followed by, where necessary, judicial intervention.

There is, however, language in some cases which seemingly supports the operator's position that the exclusive enforcement provision in denial of entry situations is a section 108(a) injunction. In addition to the statement in Stoudt's Ferry, supra; Marshall v. Nolichuckey Sand, 606 F.2d 693, 696; (6th Cir. 1979), petition or cert. filed No. 79-1204 (February 4, 1980); and Marshall v. Charles T. Sink, No. 77-2514 (4th Cir., January 24, 1980), suggest that "the Secretary must seek an injunction when an operator refuses to allow an inspection." Id. Slip opinion at 6.

In support of this conclusion, the cases cite Justice White's opinion in Marshall v. Barlows' Inc., 436 U.S. 307 (1978). There it was held that finding warrantless searches unconstitutional under OSHA would not necessarily doom similar provisions in other statutes, and that since other regulatory acts had differing "enforcement needs and privacy guarantees," they must be evaluated on a case-by-case basis. Id. at 321. In dicta, however, Justice

White cited the Metal Act of 1966 and the Coal Act of 1969 as examples of statutes which while authorizing warrantless searches provided for judicial intervention to enforce the right of entry. Id. at note 18. What Justice White failed to note was that both the Metal Act and the Coal Act were repealed by the 1977 Mine Act 6 months before the decision in Barlow's; and that the 1977 Act contains an administrative sanction for a refusal of entry not contained in either of the predecessor statutes.

Both section 8(b) of the Metal Act and section 104(b) of the Coal Act limited the sanction of closure orders to violations of mandatory standards. Therefore, the only possible remedy for a refusal of entry under both predecessor statutes was injunctive. Under section 104(b) of the 1977 Mine Safety Act, however, the closure order sanction was expanded to include violations of the provisions of the Act itself. It is the scope of this provision which is being challenged here, and it is the existence of this provision which was ignored by the Supreme Court in Barlow's.

This error on the part of Justice White was subsequently compounded by the courts of appeals in the cases cited above. For example, in Nolichuckey Sand, supra at 696, it was stated that the "enforcement provisions of the Metal Act [were] carried over to and included in the 1977 Amendments Act." What the Sixth Circuit failed to recognize was that the enforcement provisions of the Metal Act were not only carried over but supplemented by the expanded closure and penalty sanctions of the 1977 Act. It is important to note that at least one case recognized the proper interrelationship between the complementary closure and injunctive sanctions of the 1977 Act. In

Marshall v. Donofrio, 605 F.2d 1196 (3rd Cir. 1979), affirming 465 F. Supp. 838 (E.D. Pa. 1978), cert. denied No. 79-848 (February 19, 1980), the inspector issued a section 104(a) citation under the 1977 Mine Act upon a denial of entry, and a section 104(b) closure order upon a subsequent denial of entry. When the operator persisted in refusing entry even in the face of the closure order, the Secretary brought a suit for an injunction under section 108. It is significant to note that in Donofrio the propriety of first pursuing administrative remedies before resorting to the courts was never questioned.

Correctly stated, the operator's argument is that the issuance of a section 104(b) closure order in a denial of entry situation amounts to the imposition of a summary sanction and a deprivation of the operator's right to the labor of its workforce without due process. The claim is that the inspector's threat to issue such an order had, therefore, a chilling effect on the operator's exercise of his constitutionally-protected rights. This contention is incorrect in light of the remedies available to an operator faced with what he believes to be an illegal closure order.

Had the closure order issued, the operator could have immediately applied for expedited proceedings before the Commission pursuant to 29 C.F.R. § 2700.52 as well as for temporary relief pursuant to 29 C.F.R. § 2700.45 and section 105(b)(2) of the Act. If immediate relief was not granted by the Commission, the operator could then take the matter to the court of appeals. See Sink v. Morton, 529 F.2d 601 (4th Cir. 1975).

Since "such procedure accords the plaintiff due process," Sink, supra at 604, and since section 104(b) requires an inspector to issue a closure order whenever an operator refuses to abate a violation within a reasonable amount of time, it must be concluded that the threatened issuance of such an order was not unlawful or the subsequent search unconstitutional. 7/

We then come to respondent's primary contention that the Fourth Amendment precludes warrantless inspections of operations such as that of Carolina Stalite. Having found that the operation is under the jurisdiction of the Mine Act, the question becomes whether the reasoning of Marshall v. Barlow's, supra, arising under the Occupational Safety and Health Act, or that of the cases decided under the Mine Act is dispositive. Marshall v. Stoudt's Ferry, supra; Marshall v. Nolichuckey Sand, supra; Marshall v. Charles T. Sink, supra; Marshall v. Texoline, 612 F.2d 935 (5th Cir. 1980); Marshall v. Donofrio, supra. The operator argues that the Mine Act cases are not controlling since the Stalite operation is not part of a closely-regulated industry long subject to Government supervision and inspection,

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7/ Although the Constitution generally requires notices and a hearing prior to a deprivation of private property, there are well recognized exceptions to this requirement where significant governmental interests or the public health and safety are involved. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (seizure of yacht carrying contraband); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (seizure of mislabeled vitamin product); Bowles v. Willingham, 321 U.S. 503 (1944) (rent control orders); Phillips v. Commissioner of Internal Revenue, 283 U.S. 589 (1931) (collection of Federal revenue); Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921) (seizure of enemy property); North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (seizure of contaminated food). See also, In Re Surface Mining Regulation Litigation, 456 F. Supp. 1301, 1319 (D.D.C. 1978) (upholding cessation orders for failure to abate violations under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a)(2)).

no license is required to engage in this business, and it has never been pervasively regulated. 8/

In Barlow's, the Court held that warrantless inspections under the Occupational Safety and Health Act (OSHA) were violative of the Fourth Amendment. Based on its earlier decisions in Camara v. Municipal Court, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967), the Court applied the general rule that warrantless searches are presumptively unreasonable. It did not find applicable, in the OSHA context, the recognized exception to the warrant requirement which exists for "pervasively-regulated businesses" and for "closely-regulated" industries "long subject to close supervision and inspection." Barlow's, supra at 313.

The Court found that several protections are given the operator of a business when an OSHA inspector presents a search warrant. The warrant assures the owner that the inspection is reasonable, authorized by statute, and pursuant to an administrative plan containing specific neutral criteria. In addition, it advises the owner of the scope and object of the search. Id. at 323.

These protections could be provided without undue burden, in the Court's view, because of the comparative ease with which "probable cause" could be shown. The requirement of probable cause for the issuance of a search warrant for an administrative inspection is more easily met than the probable

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8/ The record discloses, however, that the plant had been inspected some 18 times by MESA and the Bureau of Mines since 1971, and was required to comply with the mandatory standards promulgated under the Metal Act of 1966.

cause requirement in the criminal law sense. A showing that a business was chosen for inspection on "the basis of a general administrative plan for the enforcement of the Act derived from neutral sources" would serve as sufficient probable cause. Id. at 321.

It is important to note, however, that the warrant requirement of the Fourth Amendment is not absolute. Search warrants are not required in certain classes of cases involving pervasively-regulated businesses or closely-regulated industries subject to strict supervision and inspection. The leading cases which illustrate this exception are Colonnade Catering Corporation v. United States, 397 U.S. 72 (1970), and United States v. Biswell, 406 U.S. 311 (1972).

Colonnade involved a warrantless inspection of a Federally-licensed liquor dealer. The court held that "Congress has broad authority to fashion standards of reasonableness for searches and seizures" in industries which have been "long subject to close supervision and inspection." 397 U.S. at 77. Noting that the liquor industry had been regulated since pre-Fourth Amendment days both in England and the American colonies, the court upheld the warrantless inspection provisions in question. Id. at 75-77.

The Supreme Court also applied this rationale in Biswell, which dealt with searches conducted under the Gun Control Act of 1968. Because of the ease with which firearms could be concealed or transported, a warrant requirement was seen as seriously reducing the effectiveness of the inspection program. Unlike the regulation of the liquor industry, however, the historic regulation of the firearms industry was relatively recent, apparently having only originated with the Federal Firearms Act of 1938. Noting that "Federal regulation of the interstate traffic in firearms is not as deeply rooted in history as is Governmental control of the liquor industry," the Court relied on Congressional findings prefacing the Gun Control Act to find that:

> [C]lose scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders. Large interests are at stake, and inspection is a crucial part of the regulatory scheme * * *. 406 U.S. at 315.

Thus, the strong public interest in the regulation of firearms reduced the amount of time necessary to establish a "tradition" of close Government supervision.

In Barlow's, the Government argued that the "pervasive regulation" exception applied because businesses subject to OSHA had been covered by the minimum wage and maximum hours provisions of the Walsh-Healey Act since 1936. The Court rejected this argument, however, because Walsh-Healey and other statutes which regulate businesses solely on the basis of their being engaged in interstate commerce are not of the same specificity and pervasiveness as OSHA. 436 U.S. at 314.

These cases read together indicate that an exception to the warrant requirement of the Fourth Amendment exists where an industry has been regulated closely over a period of time, but that the length of the historic regulation required to qualify for the exception cannot be precisely fixed, and will be greatly influenced by the nature of the public interest behind that regulation.

It must be emphasized that the Court in Barlow's explicitly limited its decision to OSHA inspections and stated that other warrantless search provisions must be examined on an individual basis in light of the "specific enforcement needs and privacy guarantees of each statute," noting that other statutes may "apply only to a single industry, where regulation might already be so pervasive that a Colonnade-Biswell exception to the warrant requirement could apply." Id. at 321. As of this date, four courts of appeals, the Third Circuit in Stoudt's Ferry, and Donofrio, supra; The Fourth Circuit in Charles T. Sink, supra; the Fifth Circuit in Texoline, supra; and the Sixth Circuit in Nolichuckey Sand, supra, have ruled that the Mine Act is such a statute and have upheld the validity of the warrantless search provision of section 103(a) of the Mine Act.

In Stoudt's Ferry, the Third Circuit held that the warrantless inspection provisions of the Mine Act are "sufficiently distinguishable from those of the Occupational Safety and Health Act so as to withstand constitutional challenge." 602 F.2d at 590. Noting that the inspection provisions of the Mine Act are more limited and closely defined than those of OSHA, the court called attention to the unequivocally stated Congressional intent that the Mine Act's inspection provisions would not require warrants and its finding that such inspections were reasonable. 9/ The Third Circuit concluded:

9/ "This is intended to be an absolute right of entry without need to obtain a warrant. The Committee notes with approval the decision of the three-judge Federal Court in Youghiogheny & Ohio Coal Company v. Morton, 364 F. Supp. 45

> Mindful of the Supreme Court's reluctance to foreclose the incremental protection afforded a proprietor's privacy by a warrant, we are persuaded that the Mine Safety Act's enforcement scheme justifies warrantless inspections and its restrictions on search discretion satisfy the reasonableness standard reasserted in Barlow's. Although the Mine Safety Act's coverage of enterprises has been broadened from that of the predecessor Coal Mine Safety Act to include other than coal mining, the statute is still much more limited than OSHA and is aimed at an industry with an acknowledged history of serious accidents. Moreover, unlike OSHA, the Mine Safety Act mandates periodic inspections and is specific in that no advance warning is to be given when the inspection is to determine whether an imminent danger exists or whether there is compliance with mandatory health and safety standards or with any citations, orders, or decisions outstanding. * * * [W]e believe that there are enough major differences between Barlow's and the case at bar to lead to a contrary result. In our view, warrantless inspections and the procedure provided for enforcement in the Mine Safety Act meet the standards of reasonableness in this pervasively regulated industry.

Id. at 593-594, accord Marshall v. Charles T. Sink, supra.; Marshall v. Texoline, supra.

Similarly, in Nolichuckey Sand, the Sixth Circuit held that a warrantless inspection of a sand and gravel pit subject to Mine Act jurisdiction was not violative of the Fourth Amendment. In so holding, the court rejected the same contentions advanced by Carolina Stalite in this proceeding that "its

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fn. 9 (continued)
(S.D. Ohio 1973) which holds the parallel provision of the Coal Act permitting unannounced warrantless inspections of coal mines constitutional. Safety conditions in the mining industry have been pervasively regulated by Federal and State law. The Committee intends to grant a broad right-of-entry to the Secretaries or their authorized representatives to make inspections and investigations of all mines under this Act without first obtaining a warrant * * *. The Committee notes that despite the progress made in improving the working conditions of the nation's miners under present regulatory authority, mining continues to be one of the nation's most hazardous occupations. Indeed, in view of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained, a warrant requirement would seriously undercut this Act's objectives." Leg. Hist. at 615.

business does not fall within an exception to the warrant requirement because the sand and gravel industry has no long history of government regulation, no license is required and it has never been 'pervasively' regulated." 606 F.2d at 695.

Agreeing that the sand and gravel industry does not have the long history of regulation and licensing referred to in Colonnade and Biswell, supra, the court noted that all employees in such operations are exposed to health and safety hazards and that it was "reasonable to bring all mineral extraction businesses and operations under a single regulatory act." Id. at 695. The court concluded that "the enforcement needs in the mining industry make a provision for warrantless inspections reasonable." Id. at 696.

The record shows and the operator does not deny that since 1971 its business has been regularly inspected and regulated under the Metal Act. Even a casual review of the Metal Act and the mandatory safety standards issued thereunder demonstrates the pervasive nature of that regulation. For these reasons, I conclude that as a matter of fact and law, respondent is engaged in a business subject to pervasive and longstanding Federal-state regulation.

Thus, it is proper to conclude that the operator is within the jurisdiction of the Mine Act and subject to the warrantless search provisions of section 103(a) until such time as the Supreme Court rules otherwise. 10/

10/ While it is unnecessary to consider the authority of the Commission to order suppression of the evidence, I note that two circuits have ruled that in a civil regulatory context the exclusionary sanction does not necessarily apply to the fruits of all unconstitutional inspections. In Todd Shipyards v. Secretary, 586 F.3d 683, 690 (9th Cir. 1978), the court held that the

Accordingly, it is ORDERED that respondent's motion for summary decision and to dismiss and to suppress evidence be, and hereby is, DENIED.

It is FURTHER ORDERED:

1. That full compliance with the Pretrial Order issued September 24, 1979, be accomplished on or before Friday, May 16, 1980.

2. That the operator's motion for a protective order be, and hereby is, GRANTED.

Joseph B. Kennedy

Joseph B. Kennedy
Administrative Law Judge

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fn. 10 (continued)
exclusionary rule is not retroactively applicable to a pre-Barlow's warrantless search under OSHA since "the deterrent effect of the exclusionary rule would not be enhanced by its application to an OSHA search that may have exceeded the Barlow's limits but which took place before the Barlow's decision." The court noted that the inspectors were acting "pursuant to an apparent Congressional authorization which had not yet been declared unconstitutional by a court of competent jurisdiction." Id. Likewise, in the present situation, even if the inspection were to be held violative of the Fourth Amendment it would have taken place long before a court of competent jurisdiction so held. Thus, since the "introduction of evidence which had been seized by law enforcement officials in good faith compliance with then-prevailing constitutional norms did not make the courts 'accomplices in the willful disobedience of a Constitution they are sworn to uphold,'" a retroactive application of the exclusionary rule would not be justified. United States v. Peltier, 422 U.S. 531, 536 (1975). Likewise, in Savina Home Industries v. Secretary, 594 F.2d 1358, 1364 (10th Cir. 1979), it was held that the exclusionary rule is not applicable to a pre-Barlow's inspection, and that evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional. In the present situation, it could not be said that the inspector should have known that his actions were unconstitutional given the state of the case law under the Mine Act. Thus, even if I were to hold the search in question violative of the Fourth Amendment, the exclusionary sanction would not be retroactively available.

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DEC 4 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
v.	:	Docket No. LAKE 80-130-M A.O. No. 21-00596-05001
ROCKITE GRAVEL COMPANY, Respondent	:	Mine: Rockite Gravel Company

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Roger L. Gilmer, Esq., Hutchinson, Minnesota, for Respondent.

Before: Judge Edwin S. Bernstein

On September 16, 1980, a hearing was held in Minneapolis, Minnesota, to determine if Respondent violated the mandatory health standard at 30 C.F.R. § 56.5-50 1/ as alleged in Citation No. 289904 and, if so, what penalty should be assessed in accordance with the criteria in Section 110(i) of the Federal Mine Safety and Health Act of 1977 (the Act).

1/ The standard in question provides in part:
"56.5-50 Mandatory. (a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971, "General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc. 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Health and Safety District or Subdistrict Office of the Mine Safety and Health Administration.

Findings of Fact

The citation in question was issued to Respondent on June 12, 1979, and read:

> The noise level around the Caterpillar #908B front end loader operator was 220% of the permissible limit for noise on June 12, 1979, day shift, from 7:05 a.m. to 3:10 p.m.

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fn. 1 (continued)

PERMISSIBLE NOISE EXPOSURES

Duration per day, hours of exposure:	Sound level, dBA, slow response
8	90
6	92
4	95
3	97
2	100
1-1/2	102
1	105
1/2	110
1/4 or less	115

No exposure shall exceed 115 dBA. Impact or impulsive noises shall not exceed 140 dB, peak sound pressure level.

NOTE: When the daily noise exposure is composed of two or more periods of noise exposure at different levels, their combined effect shall be considered rather than the individual effect of each.

If the sum

$$(C_1/T_1)+(C_2/T_2)+\ldots(C_n/T_n)$$

exceeds unity, then the mixed exposure shall be considered to exceed the permissible exposure. C_n indicates the total time of exposure at a specified noise level, and T_n indicates the total time of exposure permitted at that level. Interpolation between tabulated values may be determined by the following formula:

$$\text{Log } T=6.322-0.0602 \text{ SL}$$

Where T is the time in hours and SL is the sound level in dBA.

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table.

> Feasible engineering or administrative controls were not being used to reduce the loader operator's noise exposure to within the levels of the table in part and section 56.5-50(a) in order to eliminate the need for hearing protection.

The parties stipulated, and I find:

1. Respondent, Rockite Gravel Company, is a partnership located in South Haven, Minnesota.

2. Respondent is a small operator.

3. There is no history of previous violations by Respondent.

4. If a penalty is imposed, it will not affect Respondent's ability to continue in business.

5. The violation was abated within a reasonable time.

6. Arnie Mattson, the MSHA inspector who issued the citation, is a duly authorized representative of the Secretary of Labor.

7. The citation in question was issued by Mr. Mattson on June 12, 1979, and was duly delivered to a representative of Respondent on or about that date.

8. Hutchinson, Minnesota, is approximately 90 miles north of the Minnesota-Iowa border, and approximately 90 miles east of the Minnesota-South Dakota border. These distances represent the closest distances between Hutchinson and the next adjacent states.

At the hearing, Arnie Mattson testified for Petitioner and Robert Peterson testified for Respondent.

Inspector Mattson testified that he is a mining inspector stationed at MSHA's field office in Mankato, Minnesota. On June 12, 1979, he conducted a health inspection at Respondent's facility. During a previous visit, Mr. Mattson noticed that the front end loader was fairly loud and he felt there might be a noise problem with it. In order to verify this, he decided to take a dosimeter 2/ reading during the June 12 inspection. He asked the

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2/ The dosimeter which was introduced into evidence as Petitioner's Exhibit 6 contains a memory cell which is sensitive to all sound with a loudness between 90 and 115 decibels. The cell stores information relating to cumulative noise exposure during an entire eight-hour shift. At the end of the shift, the memory cell is placed into a read-out machine (Petitioner's operator of the loader to place the dosimeter in his shirt pocket with the microphone under his collar near his ear. The operator refused to wear the device and told the inspector to "hang it someplace else." Mr. Mattson then hung the device in the cab of the loader "close to [the operator's] hearing, trying to get the microphone so it [didn't] bang against glass or metal, [or] anything * * * that would pick up extra noise."

During the first half of the eight-hour shift, after he had hung the dosimeter, Mr. Mattson took four readings in the cab with a sound level meter. 3/ He testified that when the loader was operating normally, he got readings of 90 to 95 decibels, but when the loader was "revved up," the readings were 98 to 100 decibels. The readings dropped below 90 decibels when the loader was idling.

After taking the sound level meter readings, Mr. Mattson checked the loader for any engineering controls 4/ which may have limited the operator's exposure to noise. There was no rubber matting on the floor of the cab, but Mr. Mattson noted some insulation on the cab ceiling. He testified that rubber matting on the floor would have helped to cushion the sound from the engine, which was located in back of the cab. He also stated that the loader did not have a muffler, but only "a straight pipe for an exhaust."

Asked if he was aware of any administrative controls 5/ which may have been used to control the operator's exposure to excessive noise, Mr. Mattson

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fn. 2 (continued)
Exhibit 8) which allows the inspector to determine the percentage of allowable noise to which the worker was exposed during the shift.

It should be noted that if there is any exposure to noise louder than 115 decibels, a special indicator inside of the dosimeter is triggered. Since the standard states that "[no] exposure shall exceed 115 [decibels]," there would presumably be an automatic violation in any such situation, regardless of what readout was obtained from the memory cell.

3/ A sound level meter (Petitioner's Exhibit 7) is a small, hand-held device which gives an instant reading as to the number of decibels of noise in a given area. Mr. Mattson testified that he used the sound level meter to give him "a little idea what the dosimeter should produce at quitting time."

He also stated that he checked his equipment before and after the inspection to make sure it was operating properly. Two devices which are used to calibrate the equipment were admitted as Petitioner's Exhibits 9 and 10.

4/ Mr. Mattson explained that an engineering control was a device or mechanism which reduced the level of noise in the working area. He stated that a muffler, additional insulation, or some other barricade between the source of the noise and the working area would be examples of engineering controls.

5/ Administrative controls involve methods of organizing work assignments at the site so that a worker who is exposed to high noise levels for part of his shift is later moved to another job involving much less noise exposure. The net effect of such a system is to reduce the worker's overall noise exposure during the course of the full shift.

replied in the negative. He also determined that no personal protection equipment, such as ear plugs or ear muffs, was being used by the men, but he did not check with the owner to see if such equipment was provided.

During his testimony, Mr. Mattson repeated the statement made in the citation that the noise level in the relevant area was 220 percent of the permissible limit. Neither Mr. Mattson nor Petitioner's counsel, Mr. Carmona, was able to enunciate at the hearing exactly what this figure represented. 6/ Mr. Mattson stated that he obtained this number from the readout machine when he placed the dosimeter memory cell into it at the end of the shift. At one point in his testimony, he stated that this number represented a percentage of the "threshold limit value," which is the maximum noise that an employee can be exposed to over an eight-hour period. This explanation is consistent with the following statement printed on the back of the readout machine: "Readout value is displayed in percent of allowable OSHA exposure. 100% equals one allowable dose." 7/

6/ On September 22, 1980, after the record in this case was closed, Petitioner moved to admit into evidence the operating manual for the dosimeter which was used to take the noise readings. Respondent opposed the motion on the grounds that the operating manual "was not introduced, nor received, at the hearing" and that its introduction would deprive Respondent of "the opportunity of cross-examination."

I agree with Respondent. The May 9, 1980, Prehearing Order directed the parties, inter alia, to list proposed exhibits. Petitioner's Prehearing Report, filed May 28, 1980, did not refer either to the dosimeter or the operating manual. Nevertheless, at hearing, Petitioner utilized the dosimeter in connection with the presentation of its case. At my request, to make the record more complete, the dosimeter was introduced into evidence as an exhibit. At that time, no reference was made by Petitioner to any operating manual. In failing to offer the manual during the hearing, Petitioner deprived Respondent of the opportunity to challenge statements made in the manual, and in failing to refer to the manual and the dosimeter before the hearing, Petitioner deprived Respondent of the opportunity to prepare cross-examination and present witnesses to challenge the device as well as statements made in the manual. It is further noted that no argument was based on the manual at the hearing, in Petitioner's Motion to Supplement the Record, or in the briefs submitted by the parties. Therefore, Petitioner's motion is DENIED.

7/ The "Permissible Noise Exposure" table in 30 C.F.R. § 56.5-50, reproduced in footnote 1, supra, is identical to the table which appears in the Occupational Safety and Health Administration's noise standard. See 29 C.F.R. § 1910.95(b)(1), Table G-16. Therefore, the manufacturer's statement that the readout machine measures sound in terms of percent of allowable OSHA exposure also applies to the allowable MSHA exposure.

In its brief, Petitioner explained that the "Note" to 30 C.F.R. § 56.5-50 contains a formula for determining whether a violation of the standard has occurred when "daily noise exposure is composed of two or more periods of noise exposure at different levels * * *." The following example and explanation is helpful to understanding what the dosimeter is designed to measure (Petitioner's Brief at 11-12):

Mr. Mattson testified that the violation was abated by installing a muffler on the loader. After this was done, the inspector took several sound level meter readings which convinced him that the condition had been abated and that another dosimeter test was not necessary.

Respondent's witness was Robert Peterson. Mr. Peterson and his wife are the sole owners of Rockite Gravel Company. Mr. Peterson is also the sole proprietor of Rockite Silo Company, which is located in Hutchinson, Minnesota, approximately 30 miles south of Rockite Gravel. Rockite Gravel has five employees, one of whom serves as manager, or foreman. Mr. Peterson testified that between 10 and 20 percent of the company's production is sold locally to private consumers in the area, or to the local county government. The remaining production is trucked by an independent contractor to Rockite Silo. Rockite Silo produces several products from this material, including concrete blocks (about 15 percent of its production), silo materials (about 25 percent), farm drain tiles (10 to 15 percent), and ready-mix concrete (about 50 percent). Due to the prevailing freight charges, most of Rockite Silo's production is sold within a 50-mile radius of the company's facility in Hutchinson. On very rare occasions, products may be shipped as much as 100 miles away. Mr. Peterson testified that Rockite Silo buys from suppliers other than

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fn. 7 (continued)

"This formula can be better understood by substituting numbers for the letters in an equation in which D is the individual daily noise recorded.

Example:

$D= (C_1/T_1) + (C_2/T_2) = (C_n/T_n)$

$D= 6/8 + 1/2 + 1/1 = 2.25$ of allowable exposure

C_1 = exposure for 6 hours at 90 decibels

T_1 = 8 hours noise exposure permitted by Table in 30 C.F.R. § 56.5-50(a) at 90 decibels

C_2 = exposure for 1 hour at 100 decibels

T_2 = 2 hours noise exposure permitted by Table at 100 decibels

C_n = exposure for 1 hour at 105 decibels

T_n = 1 hour noise exposure permitted by Table at 105 decibels.

"The result in this example is 2.25 or 225% which exceeds a unity and that would be considered a violation of 30 C.F.R. § 56.5-50(a) because it exceeded the permissible exposure according to the provision in the note part of this standard. Even though in this example the individual noise levels are permissible (6 hours at 90 decibels, 1 hour at 100 decibels, and 1 hour at 105 decibels) their combined effect would result in a violation of the standard. Since the sound level meter records individual periods of noise level, a dosimeter is always used for practical purposes in situations where the daily noise exposure is composed of two or more periods of noise exposure at different levels as is shown in this example, and as is the situation in the instant case." [Emphasis in original.]

Rockite Gravel, but that he was unaware of any sales by Rockite Silo to out-of-state customers.

The Interstate Commerce Issue

Respondent contended that its operation "does not meet the definition of [interstate] 'commerce' as provided by law." It asserted in its brief that it is not subject to the Act since "its activities are conducted solely within the State of Minnesota, and because its activities do not in any way affect commerce." [Emphasis in original.] In order to decide on this question, it is necessary to examine the constitutional underpinnings of federal jurisdiction over the mining industry.

Article I, Section 8, Clause 3 of the Constitution gave Congress the power to "regulate Commerce * * * among the several States * * *". The U.S. Supreme Court has a long history of upholding federal regulation of ostensibly local activity on the theory that such activity may have some effect on interstate commerce.

In Wickard v. Filburn, 317 U.S. 111 (1942), the Court upheld a federal law regulating the production of wheat which was "not intended in any part for commerce but wholly for consumption on the farm." Id. at 118. The Court stated that "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" Id. at 125.

In 1975, the Court elaborated on this idea, stating that "[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." Fry v. United States, 421 U.S. 542, 547 (1975). More recently, the Seventh Circuit Court of Appeals relied upon Wickard when it said that the commmerce clause "has come to mean that Congress may regulate activities which affect interstate commerce." United States v. Byrd, 609 F.2d 1204, 1209 (7th Cir. 1979) [Emphasis in original.]

These principles have often been relied on by the lower courts in ruling on the coverage of the present Act and its predecessor, the Federal Coal Mine Health and Safety Act of 1969. 8/ One leading case is Marshall

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8/ Section 4 of the 1969 Act, which was substantially unchanged by the 1977 Amendments Act, provided: "Each coal mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine and every miner in such mine shall be subject to the provisions of this Act." Section 3(b) of the 1969 Act, which was not amended by the 1977 Amendments Act, defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States, or

v. Kraynak, 457 F. Supp. 907 (W.D. Pa. 1978), aff'd, 604 F.2d 231 (3d Cir. 1979), cert. denied, 444 U.S. 1014 (1980). There, the Court upheld the applicability of the 1969 Act to a small mine which was owned and operated entirely by four brothers. No other personnel had worked there for at least seven years, and the brothers had no intention of hiring other employees in the future. The brothers contended that all of the coal which they mined was sold and consumed within the State of Pennsylvania and did not involve interstate commerce. Id. at 908. The defendants admitted, however, that more than 80 percent of their production was sold to a paper processing corporation which was "actively engaged in interstate commerce." Id. at 909. The Court held that "the selling by the defendants of over 10,000 tons of coal annually to a paper producer whose products are nationally distributed enters and affects interstate commerce within the meaning of * * * the Act." Id. at 911.

A similar case was Secretary of the Interior v. Shingara, 418 F. Supp. 693 (M.D. Pa. 1976), involving a mine which was operated entirely by two brothers, Edward and Frederick Shingara. In the words of the Court, "Edward [went] underground, while Frederick [did] the hoisting." Id. at 694. The Court found that the fruits of their labor were sold as follows:

> The Shingara coal is sold primarily to Calvin V. Lenig of Shamokin, Pennsylvania who resells it, along with other coal which he has gathered, to Keystone Filler and Manufacturing Co., Inc. of Muncy, Pennsylvania and Mike E. Wallace of Sunbury, Pennsylvania. Keystone Filler combines the Shingara-Lenig coal with others in order to achieve a particular ash content, dries the mixture, and grinds it into a powder which is shipped to customers outside of Pennsylvania.

Id. The Court stated that "[a]lthough the activity in question here may seem on first examination to be local, it is within the reach of Congress because of its economic effect on interstate commerce." Id. The Court compared the facts of the case to the facts in Wickard and concluded that "the Shingara coal mining activity, which has an even more direct impact on the coal market, also 'affects commerce' sufficiently to subject the mine from which it emanates to federal control." Id. at 695.

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fn. 8 (continued)
between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof." It is clear that in enacting mine safety legislation, Congress intended "to exercise its authority to regulate interstate commerce to 'the maximum extent feasible through legislation'." Secretary of the Interior v. Shingara, 418 F. Supp. 693, 694 (M.D. Pa. 1976), quoting S. Rep. No. 1055, 89th Cong., 2d Sess. 1 (1966), reprinted in (1966) U.S. Code Cong. & Ad. News 2072.

In both Kraynak and Shingara, the coal in question was being sold to parties who were engaged in interstate commerce. In other mining cases, such facts were not shown, but the courts nevertheless utilized the seminal Wickard decision to find that the activities in question "affected commerce." Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979), involved a specific agreement between the owner of a coal mine and his buyer that the latter would sell the coal only within the state and not place any of it into interstate commerce. In holding that interstate commerce was still affected, the Court went back to the following passage from Wickard:

> It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce.

478 F. Supp. at 7, citing 317 U.S. at 128. Using this rationale, the Kilgore Court found it "inescapable that the product of the defendant's mine would have an affect [sic] on commerce. The fact that the defendant's coal is sold only intrastate does not insulate it from affecting commerce, since its mere presence in the intrastate market would effect [sic] the supply and price of coal in the interstate market." 478 F. Supp. at 7. See also Marshall v. Bosack, 463 F. Supp. 800, 801 (E.D. Pa. 1978) ("The Act does not require that the effect on interstate commerce be substantial; any effect at all will subject [the operator] to the Act's coverage.")

I am aware of only one case where a Court held that a mine did not affect commerce within the meaning of the Act. Morton v. Bloom, 373 F. Supp. 797 (W.D. Pa. 1973), involved a one-man mine which had no employees. The coal which the defendant produced was sold "exclusively within Pennsylvania." Id. at 798. The Court held that this operation was not the type which the Congress intended to cover when it enacted the statute. Id. More significantly, the Court found itself unable to conclude "that defendant's one-man mine operation will substantially interfere with the regulation of interstate commerce." Id. at 799. Even under the Wickard standard, the Court stated that the mine was "one of local character in which the implementation of safety features required by the Act will not exert a substantial economic effect on interstate commerce." Id.

I have carefully reviewed the Court's reasoning in Bloom, and I conclude that it should not be followed in the instant matter. First, I do not believe the Court properly considered all of the possible means by which the Bloom operation could have affected interstate commerce. At one point in the opinion, the Court noted that the "defendant does use some equipment in his mine which was manufactured outside of Pennsylvania * * *" 373 F. Supp.

at 798. The Court found that this did not bring the defendant's mine within the ambit of the commerce clause since the purchase of this equipment was "so limited that its use would be de minimis." Id. This reasoning, in my view, runs directly contrary to the Supreme Court's statement in Mabee v. White Plains Publishing Company, 327 U.S. 178, 181 (1946), that the de minimis maxim should not be applied to commerce clause cases in the absence of a Congressional intent to make a distinction on the basis of volume of business. And, as the Court noted in Bosack, the Mine Safety Act does not require that the effect on interstate commerce be substantial. See 463 F. Supp. at 801.

Secondly, and perhaps more importantly, the Court in Bloom did not consider the effects which many one-man coal mining operations, taken together, might have on interstate commerce. Going back once again to the Wickard case, the Supreme Court held that even if the wheat in question was never marketed, "it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce." 317 U.S at 128. Similarly, in the instant case, the gravel which Respondent supplies to Rockite Silo supplies the needs of that company, which would otherwise be reflected by purchases in the open market. While the parties indicated that Rockite Silo would have bought from local merchants even if Rockite Gravel went out of business, I believe that such practices in the open market would have enough of an effect, direct or indirect, on commerce to bring Respondent within the purview of the commerce clause, and thus the Act.

Concluding Findings and Conclusions of Law

I find that Respondent violated the mandatory standard at 30 C.F.R. § 56.5-50 as alleged. The dosimeter readout indicated that the operator of the loader was exposed to a noise level equal to 220 percent of the permissible level over the course of the shift. In my view, there was insufficient evidence that the dosimeter or other noise measuring equipment was operating improperly to negate this reading. 9/ Further, the inspector

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9/ It should be noted that Mr. Mattson did testify that the efficiency of the noise-measuring equipment could be affected by prolonged exposure to high temperatures. He stated that it was his practice to leave the equipment in the back seat of his car, but that he kept the windows rolled down when the weather was hot, and he took the equipment into his motel room with him at night when he was on the road if it was hot outside. He produced some notes which he received during a noise training course concerning the possible effect of heat on the instruments. Part of this material stated: "If the instrument is used for an extended period of time or is stored in ambient temperature above 100 degrees Fahrenheit, the battery should be removed to avoid corrosion effects of battery leakage." However, there was no firm testimony that the instruments which were used to establish this violation were exposed to excessive heat which may have affected their operation. Additionally, the training notes indicated that the primary danger from such heat was that the batteries in the instruments might leak. Apparently, testified that Respondent did not utilize any engineering or administrative controls sufficient to bring the operator's exposure within permissible limits. This testimony was uncontroverted by Respondent. The inspector also determined, and the Respondent was unable to refute, that no personal protection equipment was being used by the operator of the loader. Finally, as discussed in the preceding section, I find Respondent's argument that it does not affect commerce within the meaning of the Act to be without merit.

Turning to the criteria in Section 110(i) of the Act, I find Respondent's negligence in this matter was high, since the inspector testified that the loudness of the noise emanating from the loader was noticeable even without taking a noise level reading. The gravity was also high, since the noise which the loader operator was exposed to was more than twice the permissible exposure. However, Respondent is a small operator with no previous violations of the Act, and this violation was rapidly abated. I assess a penalty of $75 for this violation.

ORDER

Respondent is ORDERED to pay $75 in penalties within 30 days of the date of this Order.

Edwin S. Bernstein

Edwin S. Bernstein
Administrative Law Judge

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fn. 9 (continued)
this did not occur in the instant situation, since Mr. Mattson testified that he checked the batteries both before and after making the measurements which resulted in the issuance of the instant citation. Therefore, I do not find that the instruments were rendered inoperative by excessive heat prior to their use at Respondent's facility on June 12, 1980.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 5 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 80-47
Petitioner	:	A/O No. 01-01897-03004I
v.	:	
	:	Gurnee Strip Operation No. 2
BURGESS MINING AND CONSTRUCTION	:	
CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Murray Battles, Esq., Office of the Solicitor, U.S. Department of Labor, Birmingham, Alabama, for Petitioner, MSHA;
W. E. Prescott III, Burgess Mining and Construction Corporation, Birmingham, Alabama, for Respondent, Burgess Mining and Construction Corporation.

Before: Judge Merlin

This case is a petition for the assessment of a civil penalty filed by the Government against Burgess Mining and Construction Corporation. A hearing was held on November 10, 1980.

In a series of written stipulations filed on October 22, 1980, the parties agreed to the following stipulations (Tr. 4-5):

(1) Burgess Mining and Construction Company is the owner and operator of the Gurnee Strip Mine No. 2 located in Shelby County, Alabama.

(2) The parties are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

(3) The Administrative Law Judge has jurisdiction over this proceeding.

(4) The inspector who issued the subject citation and termination was a duly authorized representative of the Secretary of Labor.

(5) The true and correct copy of the subject citation, termination and extension were properly served upon the operator in accordance with the Act.

(6) Copies of the subject citation and termination are authentic and may be entered into evidence for the purpose of establishing their issuance but not for the truthfulness or relevancy of any statements asserted therein.

(7) The appropriateness of the penalty, if any, to the size of the coal operator's business should be determined based upon the fact that in 1979 the Gurnee Strip Mine No. 2 produced an annual tonnage of 55,772, and the controlling company, Burgess Mining and Construction Corporation, had an annual tonnage of 540,361.

(8) The history of previous violations should be determined based on the fact that the total number of assessed violations in the preceding 24 months is 11, and the total number of inspection dates in the preceding months is 4.

(9) The alleged violation was abated in a timely manner, and the operator demonstrated good faith in attaining abatement.

(10) The assessment of a civil penalty in this proceeding will not affect the operator's ability to continue in business.

At the hearing, documentary exhibits were received and witnesses testified on behalf of MSHA and the operator (Tr. 8-139). At the conclusion of the taking of evidence, the parties waived the filing of written briefs, proposed findings of fact and conclusions of law. Instead, they agreed to make oral argument and have a decision rendered from the bench (Tr. 139-140). A decision was rendered from the bench setting forth findings, conclusions and determinations with respect to the alleged violation (Tr. 156-160).

BENCH DECISION

> This case is a petition for the assessment of a civil penalty. The mandatory standard involved is 30 C.F.R. § 77.1606(c) which provides as follows: "Equipment defects affecting safety shall be corrected before the equipment is used."
>
> The alleged violation is set forth in the subject citation as follows:
>
> > The parking brake was inoperative on the 180 International Payhauler Company S/H, 15-19, Serial No. 669. It was not properly secured or adjusted. Brake lining was worn 50%. The running brakes were not adequate as only the right rear brake was operative as reported by the operator who was involved in the accident on November 3, 1978 at 2:45 p.m.
>
> According to the testimony of record, the piece of equipment in question, a payhauler, is used to transport coal from

the pit to the preparation plant or to the storage pile. The payhauler itself weighs about 40 tons and can carry up to 50 tons of coal. It is, therefore, a very big and a very heavy piece of equipment. The record further shows that on November 3, 1978, the payhauler loaded with coal failed to make it to the top of the ramp leading out of the pit and after stalling at a point 15 to 20 feet from the top rolled back down the ramp until it hit the highwall. The driver of the payhauler was seriously injured. I accept the testimony which indicates the foregoing occurred.

During the hearing today, the driver testified in detail with respect to the cited payhauler. He stated he had been driving this payhauler for about 2 weeks before the accident and that the brake bands were worn so badly that they would not touch the drums and that only the brake on the right rear wheel worked. I found the driver a credible witness and I accept his testimony.

I further accept the MSHA inspector's testimony that 3 days after the accident the parking brake lining was 50 percent worn upon a visual examination. The payhauler, of course, had not been used in the intervening 3 days since it had been so badly damaged in the accident.

I conclude that the conditions described by the driver and the inspector constituted defects in the equipment. Moreover, I find that these defects should have been corrected before the payhauler was used on the day in question. Accordingly, I find a violation existed.

There is no dispute as to the injury suffered by the driver. He had a fractured left elbow, a broken left wrist, a broken pelvis, first and second degree burns of the right arm and the right shoulder and lacerations over the left eye. This was a very serious violation.

I further conclude the operator was guilty of a high degree of negligence. I accept the driver's testimony that during the first week he drove the truck he told the pit mechanic about the defective brakes. It is no defense for the operator to state that the pit mechanic was a union man. The operator acts only through employees and is responsible to see to it that they do their job. The driver's testimony is uncontradicted that a week before the accident he told the mine superintendent that the brakes were not working and that the superintendent's response was only to say that they would try to fix the brakes as soon as they could. Such a response was clearly inadequate. There is no doubt that the operator is responsible for the acts of the superintendent whom it placed in such a position of authority. Finally, on the day of the accident the driver discussed the defective brakes with the truck foreman who, according to the operator's evidence today, is the pit mechanic's supervisor. Far from seeing that the payhauler was immediately taken out of service, the truck foreman asked the driver to take one load of coal out of the pit and it was on this very trip that the unfortunate accident occurred. In light of the foregoing, it is clear that the driver contacted everyone along the ladder of authority with respect to the payhauler, but that the operator's response at each and every level was deficient. I recognize that the driver drove the payhauler for 2 weeks in its dangerous condition. The driver testified that he did this because it was Christmas time. However, whether or not the driver's actions were foolhardy or justifiable is irrelevant. It is the operator's responsibility to insure that the equipment is free from defects affecting safety before being used. Accordingly, I conclude there was a high degree of negligence.

I take into account the stipulations regarding history, good faith abatement, size and ability to continue. The first three justify mitigation of the penalty amount. However, gravity and negligence are so great that a very substantial penalty must be imposed in this instance.

Accordingly, a penalty of $5,000 is hereby imposed.

ORDER

The foregoing bench decision is hereby AFFIRMED.

The operator is ORDERED to pay $5,000 within 30 days from the date of this decision.

Paul Merlin

Paul Merlin
Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

DEC 9 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. SE 80-5 A.O. No. 40-02385-03004
v.	:	Mine No. 1
MOUNTAIN ENERGY, INC., Respondent	:	

DECISION

Appearances: George Drumming, Jr., Attorney, Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the petitioner.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), charging the respondent with three alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations.

Respondent answered and contested the proposed penalty assessments and the case was scheduled for hearing at Knoxville, Tennessee, October 29, 1980. Petitioner appeared at the hearing but the respondent did not. Under the circumstances, the hearing proceeded without him and petitioner presented testimony and evidence in support of the citations and its proposal for assessment of civil penalties. A tentative partial bench decision was rendered and my final decision is hereby reduced to writing as required by the Commission's Rules.

Issues

The issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposal for assessment of civil penalties filed in this proceeding, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. One additional issue concerning respondent's failure to appear at the hearing pursuant to notice is discussed and disposed of in the course of my decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.
2. Section 110(a) of the Act, 30 U.S.C. § 820(a).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Discussion

Citation No. 145851, May 9, 1978, 30 C.F.R. § 75.1100-2, states as follows: "A water line or a 500 gallon water car was not provided for the 001 section."

The inspector fixed June 9, 1978, as the abatement date for the citation, but subsequently extended this date to August 18, 1978, by an extension notice issued on July 27, 1978, where he noted that "the mine is closed at the present time and the operator is trying to obtain a permit to build a pond to provide the water." On September 19, 1978, he extended the abatement time to November 20, 1978, and noted that "the mine has been idle for 9 weeks," and on November 21, 1978, extended it again to December 29, 1978, noting that "the mine hasn't operated in 4 months." Another extension was issued on May 9, 1978, by another MSHA inspector extending the abatement date to April 25, 1979, with a notation by the inspector that "the mine has been idle for 8 months," and finally on May 24, 1979, a third MSHA inspector terminated the citation with a notation that "the mine has been closed down by the operator."

Citation No. 145901, July 20, 1978, 30 C.F.R. § 75.902, states as follows: "A ground monitor system was not provided for the 3 phase 240 AC water pump that was located 2 crosscuts from the surface or the belt entry."

The inspector fixed August 18, 1978, as the abatement date for this citation, and on September 19, 1978, he extended the time to November 20, 1978, noting that "the mine has been idle for 9 weeks and the pump will be monitored when the mine resumes operation." The citation was terminated on March 21, 1979, and the inspector noted that "this citation is abated monitor provided."

Citation No. 145906, July 21, 1978, 30 C.F.R. § 75.1100-2(b) states: "A water line with valves and fire hose was not provided for the #1 belt conveyor."

The initial abatement date was fixed as August 18, 1978, was subsequently extended several times by MSHA inspectors, and was finally terminated on May 4, 1979, with a notation by the inspector that the operator had closed down.

Testimony and Evidence Adduced by the Petitioner

MSHA inspector James P. Payne, Sr., confirmed that he inspected the mine in question on May 9, 1978, and that he issued Citation No. 145851 after discovering that the respondent failed to provide a waterline capable of reaching the working face and that no water tank was provided. Due to the lack of this equipment for the purposes of fighting a mine fire, he cited a violation of section 75.1100-2. Mine foreman Clyde Richardson accompanied him during the inspection, admitted that the required equipment was not provided, but he offered no explanation as to why it was not provided. However, two fire extinguishers and three or four bags of rock dust were present underground (Tr. 10-13).

Mr. Payne stated that the mine employed eight to 12 men on one production shift, and that there was a coal machine, a roof bolter, and two scoops present, as well as a small amount of explosives, and in the event of a mine fire, the two fire extinguishers would be inadequate to extinguish any fire. While a fire was possible, it was not probable (Tr. 14). Coal was being produced a week or so prior to May 9, but he believes the mine ceased production sometime during July 20 to July 27, 1978, and he confirmed that he extended the abatement several times because the respondent was having difficulties in obtaining a permit to build a pond to provide water for the mine. Inspector Payne did not return to the mine after November 21, 1978, but confirmed the fact that his fellow inspectors Norris W. Ferguson and Billy Griffin visited the mine in March and May 1979. Mr. Ferguson extended the abatement time further because the mine was idle, and Mr. Griffin terminated the citation on May 24, 1979, because the respondent closed the mine down. The cited conditions were never actually abated because the mine has been abandoned. However, it has not been sealed, and in November 1980, respondent will be required to seal it and submit a required map to MSHA confirming this fact. Mr. Payne stated that he recently met Mr. Connor and discussed the matter with him (Tr. 14-19).

Mr. Payne testified further that subsequent to the issuance of the citation, coal was being dumped and hauled to the surface area of the mine by means of the scoops, and that when he returned and extended the citation the first time a belt conveyor had been installed and a waterline was laid next to the belt but had not been connected due to the lack of a supply of water. In fact, respondent purchased a waterline before he had any source of water, and Mr. Payne believed that respondent was making an effort to comply. He also believed that respondent could have purchased or rented a water tank but did not do so (Tr. 20-21).

Inspector Payne confirmed that he issued Citation No. 145901 on July 20, 1978, citing section 75.902, after finding that respondent had no ground-monitoring system for the mine. Mr. Richardson confirmed that this was the case and indicated that the required system had been ordered, but he could not recall when it was ordered, nor could he recall requesting Mr. Richardson to produce a copy of any purchase order. From past contacts with Mr. Richardson, Mr. Payne believed he was a man of his word and he simply did not question that the system was on order (Tr. 21-22).

Mr. Payne stated that the ground-monitoring system is designed to protect against shock hazards in the event of a fault in the equipment. Power from outside the mine was used to operate a 230-volt AC three-phase pump being used underground and located "a couple of crosscuts" inside the mine, and the lack of the required ground protection system could have been fatal in the event of a shock hazard (Tr. 23). At least one miner would be exposed to the hazard, and while he recalled observing the monitor during a subsequent mine visit, the mine was not in operation during the periods when the citation was extended and that is probably why it was never installed (Tr. 25). Mr. Payne could not state with any certainty whether the respondent exercised good faith, but he believed that the monitor may have been on mine property but was simply not installed and he stated that the equipment required to install the system would be available from suppliers. The pump was used to pump water out of the mine and it was kept operating while the mine was out of production to protect the equipment from the water, and his records reflect that coal was being produced on July 20 when the citation issued (Tr. 28).

Mr. Payne stated that another MSHA inspector abated the citation on March 21, 1979, after the ground-monitoring system was installed, and during that period of time, the mine was in production sporadically during the evening because the respondent was still having difficulties with the state water quality agency and was unable to obtain a permit for construction of a water pond and the mine has produced no coal for the year 1980 (Tr. 28-29).

Inspector Payne confirmed that he issued Citation No. 145906 on July 21, 1978, after finding that a conveyor belt had been installed in the mine to transport the coal from the section but no valves were installed on the waterline as required by cited section 75.1100-2(b). The conveyor belt was approximately 500 feet long, and while two fire extinguishers were on the section, the protection afforded was not as great as that provided by a waterline equipped with operational valves which would facilitate the coupling of the hose to a water supply. The waterline itself was in place along the belt, but the valves were missing. Valves could be obtained from any mine equipment supplier and it is a common item (Tr. 31-32). The mine was in operation on the day the citation issued, but the citation was extended for a period of some 60 days because the mine was subsequently out of production and he did not return after November 21. However, Inspector Ferguson went to the mine on March 21, 1979, and extended the abatement further because the mine had been idle and out of production. Inspector Griffin went there on May 24, 1979, and extended the citation further after determining that the mine had been closed (Tr. 36).

Inspector Payne testified that the respondent was attempting to comply with the requirements of the standards which he cited and the fact that he purchased the equipment necessary for abatement attests to this fact. He also indicated that respondent could not come into compliance with the water quality requirements imposed on him by the state and was unable to secure the required state permit to construct a pond to retain water from the mine, and all during the periods of time in question, the mine was operating on an intermittent basis and was more or less "wildcatted" (Tr. 36-40).

Findings and Conclusions

Respondent's Failure to Appear at the Hearing

On the facts and circumstances presented in this case, I consider respondent's failure to enter an appearance at the hearing in this matter to be a waiver of any further rights on his part to be heard. For the reasons which follow below, I conclude that respondent has had more than ample opportunity to be heard with respect to his claims that due to the demise of his company he is unable to pay any civil penalty assessments.

In this case, MSHA's proposal for assessment of civil penalties was filed with the Commission on April 1, 1980, and the certificate of service reflects that a copy was served on the respondent at the following address:

Tom Connor, President
Mountain Energy Incorporated
Route 2, Box 85 C
LaFollette, Tennessee 37766

Section 105(a) of the Act provides that "refusal by the operator or his agent to accept certified mail containing a citation and proposed assessment of penalty under this subsection shall constitute receipt thereof within the meaning of this section." Thus, it seems clear to me that Congress recognized the fact that a potential respondent could avoid process by simply ignoring or failing to pick up his mail when he recognizes and knows full well that it is from MSHA and probably contains an assessment notice. However, in this case, the respondent apparently readily accepted the proposal for an assessment of civil penalty since he filed an answer. In that answer, respondent listed his then current address as "P.O. Box 12, LaFollette, Tennessee 37766." He also listed his telephone number and he indicated that he could be contacted by phone or by mail at that address.

In its answer filed April 25, 1980, respondent asserted that the No. 1 Mine has been closed since July 18, 1978, and an attempt to reopen it was made in October 1979. However, due to lack of finances, respondent stated he has been unable to resume mining operations. Respondent requested a hearing in Jacksboro, Tennessee, "to discuss the penalties and my inability to pay my assessments at this time." The case was docketed for hearing at Knoxville, Tennessee, along with several other cases docketed for hearing during the same time period. Since Jacksboro is approximately 30 miles from

Knoxville, I believe that the hearing site is convenient to the parties. My initial notice of hearing was mailed by registered mail to the address of record given by the respondent but it was returned by the post office marked "unclaimed" after two attempts to serve it on the respondent. The second notice of hearing advising the parties of the specific hearing location in Knoxville was also mailed by registered mail and was again returned by the post office as "unclaimed."

Petitioner's counsel asserted that he personally contacted respondent's president, Tom Connor, by telephone on October 29, 1980, several hours in advance of the scheduled 2 p.m. start of the hearing for the purpose of discussing the case with him and Mr. Connor advised him that he had not received the notice of the hearing and did not intend to appear. Mr. Connor is employed as a member of the State of Tennessee Highway Patrol and apparently operated the mine as an outside business venture. Counsel asserted further that Mr. Connor's address of record is a valid address and that he had experienced problems in the past in effecting service of documents on Mr. Connor and that he enlisted the aid of an MSHA inspector to personally deliver documents to him because of his failure to accept registered mail addressed to his posted address of record (Tr. 5-6).

Commission Rule 7, 29 C.F.R. § 2700.7(b) provides in pertinent part as follows:

> [A] proposal for a penalty * * * shall be served by personal delivery or by registered or certified mail, return receipt requested. All subsequent documents may be served by personal delivery or by first class mail. Service by mail is complete upon mailing. (Emphasis added)

On the facts presented in this case, it seems clear to me that two notices of hearing were mailed to the respondent by registered mail and in both instances, he obviously ignored them. Coupled with the fact that respondent has paid no civil penalties for past violations and allowed them to go to default, the fact that MSHA followed up with additional letters in its attempts to collect those prior assessments, the fact that MSHA counsel has had to arrange for personal service of documents on the respondent because of his failure to respond to the letters, and the fact that counsel personally advised the respondent by telephone about the hearing on the morning of October 29, 1980, several hours in advance of its commencement, I can only conclude that respondent is deliberately avoiding the inevitable and that he is entitled to no further consideration. I conclude that he has been treated fairly, has had ample opportunity to be heard, and that the notices of hearing were served in accordance with the rules.

Fact of Violation

I find that the testimony of Mr. Payne concerning the conditions and practices cited by him in the three citations issued in this proceeding establish the fact of violation as charged on the face of the citations by a preponderance of the evidence and the citations are AFFIRMED. Failure to provide the required water to the working section of the mine, and failure to install the required outlet valves constituted violations of the cited sections, 75.1100-2 and 75.1100-2(b). In addition, failure to provide the required ground-monitoring system as required by section 75.902, constitutes a violation of that mandatory standard.

Negligence

I conclude and find that each of the citations in this case resulted from the respondent's failure to exercise reasonable care to prevent the conditions cited by Inspector Payne. Although there is some testimony from the inspector that some of the equipment necessary for compliance was ordered by the respondent, there is no evidence that it had been ordered in advance of the inspection, and there is an inference through the many extensions granted by the inspectors that the equipment was ordered after the citations issued. I find that all of the citations resulted from ordinary negligence.

Gravity

I find that each of the citations were serious. On each occasion, the mine was in production and men were underground. The failure to provide adequate firefighting equipment, water, and protection against possible shock and electrocution constituted serious hazards.

Good Faith Compliance

The only citation which was actually abated was the one dealing with the ground-monitoring system. The inspector recalled observing the system at the mine, but could not recall whether it was actually installed and the termination notice simply stated that it "was provided." As for the remaining two citations, although the waterline was purchased and laid next to the conveyor line, it was never operational due to the lack of a water supply. As for the valves, the record reflects that the valves were never installed and both of the citations were apparently terminated because of the fact that the mine was idle and apparently abandoned by the respondent. The record suggests that respondent was making an effort to comply and he did in fact purchase a waterline and ground-monitoring device. Accordingly, I conclude that while total abatement has never been achieved due to the fact that the mine closed down, respondent should not be penalized further for this.

History of Prior Violations

Petitioner's Exhibit P-1 is a computer printout reflecting respondent's prior history of violations. The printout reflects that for the period July 22, 1976, through July 21, 1978, respondent was issued 18 citations for which he was assessed a total of $934 in civil penalties. Surprisingly, however, the printout reflects that respondent has paid none of the assessments, and with the exception of four citations which were contested before a Commission judge, the respondent was defaulted on the remaining 14 listed citations.

During the course of the hearing, petitioner's counsel was asked to explain the computer code DLT3 as shown on Exhibit P-1. Counsel was unable to explain the coding, but by letter filed with me on November 17, 1980, counsel indicated that respondent had defaulted on 14 of the citations listed on the computer printout and that MSHA had apparently sent him three letters on each violation demanding payment for the outstanding violations.

Petitioner's counsel stated at the hearing that respondent's 18 prior citations is not excessive (Tr. 7). While I am in agreement with that conclusion and find that for purposes of the instant case, respondent's prior history does not warrant any increase in the penalties assessed, the fact is that respondent has totally ignored prior assessments levied by MSHA for past violations and has paid nothing for these prior assessments. In the circumstances, I can find no mitigating circumstances which would warrant any further consideration for the respondent and I have given him none.

Size of Business and Effect of Civil Penalties on Respondent's Ability to Remain in Business

Petitioner agrees that respondent is a small operator (Tr. 7) and I accept that as my finding in this matter. Further, the record adduced in this case reflects that the mine has been closed and that respondent is no longer in business. However, absent any input from the respondent as to his ability to pay, I cannot conclude that the penalties assessed will adversely affect his ability to stay in business. His answer of April 21, 1980, implies that he may still be interested in resuming mining but has been unable to raise any capital. In any event, since it appears that he is no longer in business, the question of the impact of the penalties on his ability to remain in business appears to be moot. I believe that respondent has had more than a fair opportunity to come forward and be heard, but for reasons known only to the respondent it seems obvious to me that he is avoiding any confrontation with MSHA at a hearing and I do not intend to waste any more of the Commission's valuable resources dragging the respondent into court kicking and screaming.

Penalty Assessments

In view of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that the initial penalty assessments made and proposed by the petitioner for the three citations in issue are reasonable and should be affirmed. Accordingly, I adopt the proposed penalties as appropriate for the citations in question and they are as follows:

Citation No.	Date	30 C.F.R. Section	Assessment
145851	5/09/78	75.1100-2	$ 66
145901	7/20/78	75.902	56
145906	7/21/78	75.1100-2(b)	114
			$236

ORDER

Respondent IS ORDERED to pay the civil penalties assessed in this proceeding, as indicated above, within thirty (30) days of the date of this decision. Upon receipt of payment by the petitioner, this matter is DISMISSED.

George A. Koutras
George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

DEC 9 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. GROVE CRUSHING COMPANY, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 79-319-M MSHA CASE NO. 35-02844-05001 MINE: SAGER CREEK PIT

DECISION

APPEARANCES:

William W. Kates, Esq., Office of Robert A. Friel, Associate Regional Solicitor, United States Department of Labor, Seattle, Washington
for Petitioner,

Michael R. Hughes, President of Grove Crushing Company, appearing pro se, Eugene, Oregon
for Respondent.

Before: Judge John J. Morris

In this civil penalty proceedings, Petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), alleges that respondent, Grove Crushing Company (GROVE), violated five safety regulations promulgated under the authority of the Federal Mine Safety and Health Act of 1969 (amended 1977), 30 U.S.C. § 801 et seq.

Pursuant to notice, a hearing on the merits was held in Eugene, Oregon, on July 9, 1980. Patrick Bodah testified for MSHA and Michael R. Hughes testified for GROVE. The parties did not file post trial briefs.

ISSUES

The issues are whether the violations occurred and what penalty, if any, is appropriate.

Both the inspector and Mr. McGuire agreed that the continuous-mining machine was broken down and was being repaired. The inspector found it necessary to extend the time for compliance because it was not possible for the roof-bolting machine to pass by the inoperative continuous-mining machine for the purpose of installing additional bolts (Exh. 19). The inspector eventually terminated the notice of violation when he was told that they had withdrawn from the pillar split cited in his notice. The inspector stated that he did not go back to check the area cited in his notice because he agreed that no bolts needed to be installed in an area where no further mining would be done (Tr. 196-198). Mr. McGuire testified that they completed mining of coal in the area after the continuous-mining machine was repaired and that they did not install any additional roof bolts because they did not need to do so (Tr. 577).

Once again, I find that the inspector's testimony is more credible than Mr. McGuire's because Mr. Puckett, the mine foreman, was with the inspector when the inspector made his measurements and all discussions about the abatement of the violation were with Mr. Puckett rather than with Mr. McGuire. Additionally, Mr. McGuire stressed in his testimony the difficulty he was having replacing the pump motor. The inspector stated that Mr. McGuire continued to work on the continuous-mining machine all the time the inspector was examining the section (Tr. 195). As interested as Mr. McGuire was to restore the continuous-mining machine to operation, it is unlikely that he would have taken out time from that important matter to check the distance between roof bolts and if he had, his statements in this proceeding have shown that he would have hotly contested an inspector's claim that roof bolts had been installed excessively wide apart if, in fact, they had not been so installed.

As the inspector testified, rocks may fall from the area between roof bolts when they are installed on an excessively wide spacing, but in this instance, the violation appears to be moderately serious since the inspector did not observe any obviously bad roof. There was a high degree of negligence because respondent has previously been cited for installing roof bolts on a wider spacing than its roof-control plan permits (Tr. 197; Exh. 18). In such circumstances, a penalty of $50 is warranted, keeping in mind respondent's difficult financial condition.

Docket No. PIKE 78-308-P

Notice No. 3 EDF (7-40) 7/15/77 § 75.326 (Exhibit 51)

Findings. Section 75.326 requires that return air courses be separated from belt haulage entries. Respondent violated section 75.326 because there were holes ranging from 1/3 of an inch to 2 inches in length in three permanent stoppings located outby spad No. 5162 (Tr. 389). The violation was only moderately serious because it was not proven that the holes extended all the way through the stoppings and no methane has been detected in respondent's mine. The inspector did not take either a methane reading or a bottle sample of air to check for methane on the day the notice was written (Tr. 392; 396-399). There was a low degree of negligence because both sides of the cinder blocks had been plastered, but some small cracks did exist on at least one side of the wall (Tr. 601).

Conclusions. Mr. McGuire, respondent's witness, testified that he examined the stoppings cited in Notice No. 3 EDF and that the stoppings had been plastered on both sides. Since the stoppings are made of cinder blocks which are hollow in the middle and 8 inches thick, Mr. McGuire contended that just because there were cracks from 1/3 of an inch to 2 inches on one side of the wall did not mean that the holes extended all the way through the blocks and that the only way one could be certain that the holes did pass all the way through the wall would be to have a person hold a light on one side of the wall while another person stood on the other side to determine if the light could be seen on the opposite side of the wall (Tr. 601).

I would have found that no violation was proven if Mr. McGuire had actually made a check with the use of a light on the opposite side of the stoppings while he checked for light passing through the stoppings, but neither he nor the inspector had made the necessary check to determine if the holes passed all the way through the stoppings (Tr. 606). The inspector stated that air pressure is greater on the return side of the stoppings than it is on the belt side and that there is always a possibility that methane may pass through stoppings with holes in them so as to produce an explosive quantity of methane in the belt entry where nonpermissible electrical equipment is located (Tr. 400).

Inasmuch as neither the inspector nor respondent's witness disputed the fact that small cracks existed in the stoppings, there was a possibility that air, laden with methane, might have passed from the return into the belt entry. As indicated above, however, the violation in this instance was only moderately serious. Respondent was negligent in failing to plaster the stoppings thoroughly because a check with a light by a person situated on each side of a stopping should not be necessary in order to be certain that return air will be prevented from flowing through the stopping into the belt entry. Therefore, a penalty of $15 will be assessed, bearing in mind respondent's difficult financial condition.

Notice No. 4 EDF (7-41) 7/15/77 § 75.200 (Exhibit 54)

Findings. Respondent's roof-control plan requires that reflectorized warning devices be suspended from at least two roof bolts in the last row of bolts except when bolts have been installed within 4 feet of the faces (Exh. 1B, p. 6). Respondent violated section 75.200 because reflectorized warning devices had not been suspended from the last row of bolts in the Nos. 1, 2, 3, 4, and 6 entries and bolts had not been installed within 4 feet of the faces (Tr. 402). The violation was serious because the reflectors indicate to miners working on the section that the roof inby the reflectors has not been bolted. There was a high degree of negligence involved in failure to install the reflectors (Tr. 404-407).

Conclusions. Respondent's witness, Mr. McGuire, agreed that the miners may not have installed all the reflectors which should have been installed and that he had made no actual check so as to be able to testify as to which entries did have reflectors and which did not (Tr. 607-608). Mr. McGuire tried to cast doubt on the likelihood that all five entries could need reflectors at any one time by contending that if it were true, there would not have been any place where the men could have worked (Tr. 609-610; 615-616). Regardless of the logic of Mr. McGuire's contentions, I must take the inspector's testimony as being more credible than Mr. McGuire's arguments when Mr. McGuire fails to support his opinions with actual observations which he has made and which he can unequivocally state support his belief that the inspector was wrong in citing five different entries.

Inasmuch as the violation was serious and there was a high degree of negligence, a penalty of $50 will be assessed for this violation of section 75.200, bearing in mind respondent's difficult financial condition.

Docket No. PIKE 79-99-P

Order No. 65862 3/15/78 § 75.400 (Exhibit 57)

Findings. Section 75.400 provides that coal dust, including float coal dust on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment. Respondent violated section 75.400 because float coal dust was present along the entries of three conveyor belts and was prevalent on the roof, ribs, floor, timbers, belt structures, and power wires. Loose coal and coal dust were present up to 9 inches in depth under the conveyor belt, beginning at the No. 2 belt drive and extending inby the No. 3 belt drive for a distance of 400 feet. The violation was very serious because the conveyor belt was dragging on top of the loose coal and four rollers were stuck along the Nos. 1 and 2 conveyor belts. The stuck rollers were a source of friction and heat which could have started a fire and the wires and motors in the belt entries constituted potential fire hazards. There was a high degree of negligence in respondent's permitting float coal dust and loose coal dust to accumulate to the extent that it had (Tr. 822; 828; 837; 840; 846; 860-861).

Conclusions. Respondent's witness, Mr. McGuire, testified that he went into the mine on the day Order No. 65862 was written and he agreed that there may have been some float coal dust around the belt head and that some loose coal had fallen from the belt conveyors, but Mr. McGuire said they had a cleanup program under which they clean up loose coal once a week and apply rock dust. They clean and rock dust more often than once each week, if necessary, to prevent accumulations (Tr. 864-868). Mr. McGuire stated that there was moisture along the belts and that wet belts would pick up coal dust and deposit the dust as float coal dust after it had dried. Mr. McGuire said that it had been only 2 days since the belt entries had been cleaned, but he agreed that the frequency of cleaning should be increased when weekly cleaning fails to prevent accumulations of combustible materials. Nevertheless, Mr. McGuire did not change his cleanup program after Order No. 65862 was written (Tr. 879).

Since the violation was very serious and there was a rather high degree of negligence, a penalty of $100 will be assessed for this violation of section 75.400, bearing in mind respondent's difficult financial condition.

Order No. 65862 3/15/78 § 75.1725 (Exhibit 57)

Findings. Order No. 65862, discussed above, also alleged a violation of section 75.1725 which provides that machinery and equipment shall be maintained in a safe operating condition and that equipment in an unsafe condition shall be removed from service immediately. Respondent violated section 75.1725 because the stuck rollers, float coal dust, and loose coal along the conveyor belts had created unsafe conditions, but the conveyor belts were being used for producing coal despite the fact that they were exposing the miners to a possible fire or explosion because of the stuck rollers and undue amount of combustible materials which existed along and under them (Tr. 823; 861).

Conclusions. The violation of section 75.1725 is interrelated with the violation of section 75.400. I frequently have cases in which violations of section 75.400 are cited and the inspectors state that they also found stuck rollers which produce an ignition hazard. The ignition hazard is taken into consideration under the criterion of gravity in assessing a penalty for the violation of section 75.400. All inspectors could technically cite a violation of section 75.1725 every time they find stuck rollers, but it has been my experience that they rarely cite section 75.1725 in conjunction with stuck rollers associated with loose coal and coal-dust accumulations. Since I have taken the gravity of the violation of section 75.1725, having to do with stuck rollers, into consideration in the assessment of the penalty for the violation of section 75.400 also cited in Order No. 65862, I believe that the additional violation of section 75.1725 should not be given an incrementally high penalty. In such circumstances, a penalty of $5 will be assessed for this violation of section 75.1725, bearing in mind respondent's difficult financial condition.

Order No. 65862 3/15/78 § 75.1101-1 (Exhibit 57)

Findings. Order No. 65862, discussed above, also alleged a violation of section 75.1101-1 which provides that deluge-type spray systems shall be installed at main and secondary belt-conveyor drives. Such sprays become operative when there is a rise in temperature great enough to cause a fire sensor to activate a control valve. Respondent violated section 75.1101-1 because the deluge-type spray system at the No. 3 conveyor-belt drive was rendered inoperative by disconnection of the chain and sensors which cause the control valve to open. Additionally, some of the water sprays were broken (Tr. 825). The violation was serious because combustible materials were present in the vicinity of the No. 3 belt head and the deluge-type spray system would not have assisted in putting out any fire which might have occurred (Tr. 828; 861). There was a high degree of negligence because the preshift examiner should have observed that the chain to the valve was disconnected or broken with the result that the deluge-type water system would not work if needed (Tr. 826).

Conclusions. Respondent's witness, Mr. McGuire, stated that the fire-suppression system and chain controlling the valve were connected when he inspected the conveyor-belt drives cited in Order No. 65862 (Tr. 878). Inasmuch as Mr. McGuire was not present at the time the inspector observed the conditions along the conveyor belts, I conclude that the inspector's testimony is sufficiently credible to support my findings above that the violation occurred, that it was serious, and that respondent was negligent. The inoperative water-deluge system was taken into consideration above in assessing a penalty for the violation of section 75.400 cited in Order No. 65862. In view of the interrelated overlapping of the violations cited in Order No. 65862, a penalty of $25 will be assessed for this violation of section 75.1101-1.

Docket No. PIKE 79-77-P

Citation No. 65863 3/21/78 § 75.601 (Exhibit 60)

Findings. Section 75.601, to the extent here pertinent, provides that the disconnecting devices used to disconnect power from trailing cables shall be plainly marked and identified and that such devices shall be designed so that it can be determined by one's eyesight that the power is disconnected. The preponderance of the evidence shows that no violation of section 75.601 occurred (Tr. 883-905). The sole action that respondent had to take to abate the alleged violation was to paint the female and male receptacles for each piece of equipment a matching color so that an illiterate person would theoretically be able to determine which circuit breaker should be connected to a given piece of equipment. Respondent's power center had been manufactured specifically for the types of equipment used in respondent's mine (Tr. 892). Therefore, each circuit breaker and trailing cable had already been labeled, before Citation No. 65863 was written, so that a person who can read would know which circuit breaker to connect for the continuous-mining machine, or roof-bolting machine, or shuttle car. Moreover, a chain was attached to each disconnect device so that the power for the shuttle car, for example, could not be plugged into the circuit for the continuous-mining machine or roof-bolting machine. Consequently, even an illiterate person would not be able to connect the wrong trailing cable to the wrong circuit in the power center. There is nothing in section 75.601 which specifically requires respondent to paint the disconnect devices with different colors of paint so that an illiterate person would be able to determine, for example, that a pink plug is to be connected only with a matching pink receptacle in the power center. Finally, since the circuit breakers for the off-drive shuttle car and the standard-drive shuttle car are the same size, an illiterate person would be unable to determine, if, for example, he were sent to the power center to disconnect the trailing cable for the off-drive shuttle car, whether he would be supposed to disconnect the circuit breaker painted blue or the circuit breaker painted yellow in order to be sure that he was disconnecting the off-drive shuttle car instead of the standard-drive shuttle car.

Conclusions. In this instance, I have chosen to accept the testimony of respondent's witness, Mr. Leslie, as being more credible than that of the inspector. Mr. Leslie was with the inspector when Citation No. 65863 was written and Mr. Leslie's testimony shows that he is more familiar with the electrical equipment in the mine than the inspector was. Mr. Leslie testified that it was necessary for him to purchase five different colors of paint for application to the disconnect devices in order to abate the citation (Tr. 892). The inspector claimed that the disconnect devices were neither marked nor color-coded (Tr. 891), but Mr. Leslie claimed that the power center was ordered from the factory with labels for the various types of equipment already installed on the equipment (Tr. 893). Mr. Leslie introduced as Exhibit E a picture of the type of device which is used to connect equipment at the power center (Tr. 902). There is no reason to believe that Mr. Leslie was mistaken about the types of labels which he had requested the manufacturer to place on the disconnect devices (Tr. 894).

It should be noted that the language used in Citation No. 65863 is susceptible to the interpretation of the facts given by Mr. Leslie because the citation alleges that the "* * * connecting plugs were not plainly marked or colored" (Exh. 60). Since the connecting plugs had already been plainly marked before the citation was written, it was necessary for the inspector to use the words "plainly marked or colored" in his citation in order to show that the conditions he observed constituted a violation of section 75.601 because the language in that section requires plain marking but fails to mention color-coding. If respondent's disconnect devices had not already been plainly marked, the inspector could have required color-coding as one way of accomplishing the plain marking required by section 75.601, but the inspector cannot properly cite respondent for violating section 75.601 when plugs and receptacles have already been plainly marked, but the inspector additionally wants the disconnect devices painted with matching colors as a means of further plainly marking the disconnect devices for the benefit of illiterate persons who are unable to read the labels which respondent had already placed on the disconnect devices.

For the foregoing reasons, the Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-77-P will be dismissed insofar as it alleges a violation of section 75.601 in Citation No. 65863 dated March 21, 1978.

Citation No. 65864 3/21/78 § 75.503 (Exhibit 62)

Findings. Section 75.503 requires that electrical equipment used inby the last open crosscut be permissible. Respondent violated section 75.503 because an opening in excess of .005 of an inch was present between the cover plate at the top of the trailing cable junction box and at the bottom of the main panel box on the continuous-mining machine (Tr. 907). The violation was moderately serious because, although no methane was present at the time the violation was observed, it is always possible for methane to accumulate in a coal mine so as to cause an explosion (Tr. 911). There was a low degree of negligence because no bolts were missing and the machine vibrates constantly so that it may jar bolts loose. The inspector did not know how long the .005 of an inch opening had existed (Tr. 913).

Conclusions. The operator's witness, Mr. Leslie, testified that he could not dispute the existence of the .005 of an inch opening because he personally observed the inspector insert the .005 of an inch gauge into the opening (Tr. 917). Since the violation was moderately serious and there was a low degree of negligence, a penalty of $15 will be assessed for this violation of section 75.503, bearing in mind respondent's difficult financial condition.

Citation No. 65865 3/21/78 § 75.503 (Exhibit 64)

Findings. Respondent violated section 75.503 again because an opening in excess of .005 of an inch existed on the No. 2 Joy shuttle car between the cover plate and the panel box. Additionally, the headlights were inoperative on both ends of the shuttle car. The violation was moderately serious as to the opening in the panel box, but the lack of headlights on either end of the shuttle car was serious because the shuttle car is driven around corners and through crosscuts where the shuttle car becomes a hazard for miners who are working on the section. There was a high degree of negligence in respondent's permitting the shuttle car to be driven without having the lights replaced (Tr. 921-929).

Conclusions. Respondent's primary defense as to the violation of section 75.503 alleged in Citation No. 65865 was that headlights on shuttle cars glare in the eyes of the operator of the continuous-mining machine and consequently the operators of the shuttle cars do not use the headlights even when the lights are capable of being operated (Tr. 930-931). The inspector stated that the operator of the shuttle car normally turned off the light on the end next to the continuous-mining machine when coal was being loaded into the shuttle car and turned on the light on the outby end of the shuttle car so as to avoid blinding the operator of the continuous-mining machine. The inspector stated that he had driven shuttle cars while using only his cap light for illumination, as was being done in this instance, and that he felt he had less light than is needed to permit safe operation of the shuttle car (Tr. 928-929). Inasmuch as the violation was serious and there was a high degree of negligence, a penalty of $25 will be assessed for this violation of section 75.503, bearing in mind respondent's difficult financial condition.

Citation No. 65866 3/21/78 § 75.503 (Exhibit 66)

Findings. Respondent again violated section 75.503 by failing to have operative headlights on either end of the No. 1 Joy shuttle car (Tr. 932-933). Both the inspector and respondent's witness stated that their testimony with respect to the lack of headlights on the No. 1 shuttle car would be identical with the testimony they had already given with respect to the lack of headlights on the No. 2 shuttle car (Tr. 933).

Conclusions. Since this violation was identical with the previous violation as to the No. 2 shuttle car, the same findings would apply and a penalty of $25 should be assessed for this violation of section 75.503.

Citation No. 65867 3/22/78 § 77.1605(a) (Exhibit 68)

Findings. Section 77.1605(a) provides that cab windows shall be in good condition and shall be kept clean. Respondent violated section 77.1605(a) because a truck loading coal at respondent's loading chute had three or four cracks in the windshield on the driver's side. The violation was moderately serious because glares from the cracks in the windshield might have caused the driver to have an accident resulting from his inability to see clearly through the cracked windshield. Respondent was not negligent because the truck with the cracked windshield was used to haul one load of coal from respondent's mine. The truck had never been driven to respondent's mine on any occasion prior to the time the cracked windshield was observed by the inspector and was never used to haul coal from respondent's mine on any other occasion (Tr. 937-946; 947-949).

Conclusions. The truck involved in the violation alleged in Citation No. 65867 was driven to respondent's mine to obtain a single load of coal. The circumstances were that the independent contractor's regular truck needed to have a tire repaired. While the tire was being repaired, the person who normally hauled coal for respondent asked a substitute driver to use that driver's own truck to transport a load of coal from respondent's mine. The substitute truck had the cracked windshield described in Citation No. 65867, but respondent was unaware that the substitute truck and driver had been asked to haul a load of coal from respondent's mine and respondent's owners were not close enough to the truck on its single visit to respondent's mine to know that it had a cracked windshield (Tr. 948-949). Moreover, the inspector terminated the citation without ever knowing whether the crack in the windshield was ever replaced because the citation was terminated with an explanation that the truck left mine property and was no longer used to haul coal from respondent's mine (Exh. 70).

The Commission held in Republic Steel Corp., 1 FMSHRC 5 (1979), Kaiser Steel Corp., 1 FMSHRC 343 (1979), Consolidation Coal Co., 1 FMSHRC 347 (1979), Old Ben Coal Co., 1 FMSHRC 1480 (1979), and Monterey Coal Co., 1 FMSHRC 1781 (1979), that an operator may be held liable for violations by independent contractors even if the independent contractors' employees are the only persons involved in a particular violation. Therefore, the inspector properly cited respondent for the violation of the substitute independent contractor in this instance because respondent would have been liable for a violation committed by the driver of the truck which was normally used to haul coal from respondent's mine and can be held liable for violations committed by a substitute driver who is hired by the independent contractor who normally hauls respondent's coal.

In view of the fact that only one load of coal was hauled by the truck involved in Citation No. 65867, I think that only a nominal penalty should be assessed in the circumstances which prevailed in this instance. Therefore, a penalty of only $1 will be assessed for this violation of section 77.1605(a).

Docket No. KENT 79-1

Citation No. 64600 11/16/78 § 75.1722(b) (Exhibit 71)

Findings. Section 75.1722(b) provides that guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley. Respondent violated section 75.1722(b) because an adequate guard had not been provided for the No. 2 conveyor belt drive and discharge roller inasmuch as a person could become caught between the belt and pulley. The inadequate guard was located at the point where the No. 2 belt dumps coal on the No. 1 belt. Spillage of coal occurs at that discharge point and it is necessary for a miner to clean up the spillage. Therefore, the violation was serious because an inadequate guard exposes the miner who is cleaning up the coal to becoming caught between the belt and the pulley. Respondent was negligent because a chain-link fence had been erected around the exposed machine parts, but the guard had been taken down so that it provided no protection at the time the violation was observed by the inspector. The examiner of the belt should have noticed the absence of the guard and should have had it reinstalled in proper position (Tr. 951-961).

Conclusions. Respondent's witness, Mr. McGuire, testified that he was one of the first persons ever to use a chain-link fence as a guard at conveyor belt drives, but Mr. McGuire was not present at the time Citation No. 64600 was written and conceded that someone could have shoveled coal from under the belt drive and could have left the fence down. He said it was the responsibility of the person who takes the fence down to rehang it (Tr. 974; 977). It is respondent's duty to see that its employees comply with the safety standards, so I cannot find that respondent has a valid defense in this instance. Since the violation was serious and respondent was negligent, a penalty of $25 will be assessed for this violation of section 75.1722(b), bearing in mind respondent's difficult financial condition.

SETTLED ISSUES

The matters to be considered in this portion of my decision are discussed in the 47-page motion for approval of settlement filed on October 15, 1980, by MSHA's counsel. Under the settlement agreement, respondent would pay penalties totaling $4,631 instead of the penalties totaling $8,031 proposed by the Assessment Office. The motion for approval of settlement disposes of the remaining 82 violations which were not the subject of the hearing held in 1979. The motion considers violations alleged in Petitions for Assessment of Civil Penalty which were filed in 12 different docket numbers. As previously indicated on page 2 of my decision, all of the violations alleged in the Petitions for Assessment of Civil Penalty filed in Docket Nos. PIKE 78-451-P, PIKE 78-458-P, and KENT 79-1 were the subject of testimony introduced at the hearing held in 1979 and the issues raised in those three Petitions have been entirely disposed of in the first portion of this decision which deals with contested issues.

Also, as previously indicated on page 2 of my decision, some of the issues raised by the Petitions for Assessment of Civil Penalty filed in Docket Nos. PIKE 78-308-P, PIKE 79-77-P, and PIKE 79-99-P are partially disposed of in the portion of my decision devoted to the contested issues and the remainder of the issues raised by the Petitions filed in those three docket numbers are disposed of by the motion for approval of settlement. Finally, the issues raised by the Petitions filed in the remaining nine docket numbers involved in this consolidated proceeding are disposed of by the motion for approval of settlement.

As to the six criteria which are used in determining penalties, it should be noted that my decision on the contested issues has already made findings as to three of those criteria, namely, the size of respondent's business, the question of whether payment of penalties would cause respondent to discontinue in business, and respondent's history of previous violations. The findings as to the aforesaid three criteria are based on the evidence received during the hearing held in 1979 and they are applicable to the settled issues as well as to the contested issues which have already been considered above.

The finding made in my decision with respect to a fourth criterion, namely, that respondent had demonstrated a normal good faith effort to achieve rapid compliance is applicable to the settled issues except for the alleged violations which became the subject of withdrawal orders issued under section 104(b) of the Act. The motion for approval of settlement takes the position that respondent did not demonstrate a good faith effort to achieve rapid compliance with respect to all violations involving issuance of withdrawal orders under section 104(b) of the Act. Under the settlement agreement, respondent has agreed to pay the full penalty proposed by the Assessment Office in all instances involving issuance of withdrawal orders.

The motion for approval of settlement agrees that the evidence introduced at the hearing held in 1979 shows that payment of penalties will have an adverse effect on respondent's ability to continue in business. The motion states that respondent will have to secure a loan in order to pay the settlement penalties totaling $4,631 and asks that I give respondent a period of 90 days after issuance of my decision within which to pay the penalties because respondent needs more than the normal 30-day period for obtaining the loan before payment is due. I find that the request for a 90-day period within which to pay penalties is reasonable and the order accompanying this decision will so provide. That request is especially reasonable when it is considered that my decision with respect to the contested issues requires respondent to pay penalties totaling $636 in addition to the settlement penalties totaling $4,631.

I shall now give consideration to the matters discussed in the motion for approval of settlement.

Docket No. PIKE 78-308-P

The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 78-308-P seeks assessment of penalties for 12 alleged violations. Two of those violations have already been disposed of under the portion of this decision devoted to contested issues. Respondent has agreed to pay the full amount of the penalties proposed by the Assessment Office with respect to the remaining 10 alleged violations except for Notices of Violation Nos. 4 RM (7-45) and 2 RM (7-47) dated July 14 and July 15, 1977, respectively, as to which MSHA's counsel indicates that no penalty should be paid for the two violations of section 75.403 alleged in those notices because MSHA does not have the results of the laboratory analyses of dust samples which are required for proof of such violations (Hall Coal Co., Inc., 1 IBMA 175 (1972), and Valley Camp Coal Co., 1 IBMA 243 (1972)).

The motion for approval of settlement states that MSHA declined to settle the two violations alleged in Notice Nos. 1 RM (7-42) and 2 RM (7-43) both dated July 14, 1977, for less than the penalties of $106 each proposed by the Assessment Office because respondent failed to abate the alleged violations until after withdrawal orders were issued under section 104(b). The motion avers that the failure to abate the alleged violations before withdrawal orders were issued indicated a failure of respondent to demonstrate a good faith effort to achieve rapid compliance.

I find that the motion for approval of settlement (pp. 7-11) has provided ample reasons for approving the settlement agreement under which respondent would pay total penalties of $534 instead of total penalties of $621 as proposed by the Assessment Office for the remaining 10 alleged violations involved in Docket No. PIKE 78-308-P.

Docket No. PIKE 79-25-P

The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-25-P seeks to have penalties assessed for 20 alleged violations. None of those alleged violations were the subject to any testimony at the hearing held in 1979. The Assessment Office proposed penalties totaling $3,509 in this docket. Under the settlement agreement, respondent would pay reduced penalties totaling $960. More of the reductions in penalties involved in the parties' settlement agreement relate to the violations alleged in Docket No. PIKE 79-25-P than are involved in any of the other docket numbers. The motion for approval of settlement (pp. 12-22) justifies many of the reductions on the basis that respondent's mine has never shown a history of releasing methane and on the fact that respondent has proven that it is in a very difficult financial condition. Additionally, it is a fact that the Assessment Office rated all of the violations alleged in Docket No. PIKE 79-25-P as being more serious and involving a greater degree of negligence than it did for similar violations involved in the other dockets. I find that the motion for approval of settlement has shown adequate reasons for reducing the penalties to the total of $960 which respondent has agreed to pay.

Docket No. PIKE 79-50-P

The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-50-P seeks to have penalties assessed for two violations, neither of which was considered at the hearing held in 1979. Under the settlement agreement, respondent would pay penalties totaling $85 instead of the penalties totaling $174 proposed by the Assessment Office. The motion for approval of settlement (pp. 14 and 22) justifies the reduction in the proposed penalties on the grounds, as to the permissibility violation, that no methane has ever been detected in respondent's mine and that no negligence on the part of respondent could be shown. As to the alleged violation of section 75.603, the reduction is based on the fact that respondent was aware of the existence of two temporary splices in the trailing cable and was in the process of obtaining a new trailing cable. I find that adequate reasons have been given for approving the reductions agreed upon as to the Petition filed in Docket No. PIKE 79-50-P.

Docket No. PIKE 79-77-P

The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-77-P seeks to have penalties assessed for seven alleged violations. All but one of the alleged violations were the subject of evidence presented during the 1979 hearing and have been disposed of in the section of this decision devoted to the contested issues. Under the settlement agreement, respondent has agreed to pay in full the penalty of $40 proposed by the Assessment Office for the remaining alleged violation of section 75.1704 involved in this docket number. The motion for approval of settlement (p. 22) justifies the proposed penalty of $40 by noting that the circumstances of the violation are such that negligence on the part of the operator cannot be established. I find that the penalty of $40 is reasonable and that the settlement agreement with respect to this alleged violation of section 75.1704 should be approved.

Docket No. PIKE 79-99-P

The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-99-P seeks to have penalties assessed for four alleged violations. Three of those alleged violations were the subject of testimony introduced at the 1979 hearing and have been disposed of in the section of this decision devoted to contested issues. Under the settlement agreement, respondent would pay a reduced penalty of $40 instead of the penalty of $80 proposed by the Assessment Office for the violation of section 75.400 which has not already been considered as a part of the contested issues. The motion for approval of settlement (pp. 23-24) justifies the reduction primarily on the ground that respondent is in a difficult financial condition. I find that a sufficient reason has been given for approving the parties' settlement as to Docket No. PIKE 79-99-P.

Docket No. KENT 79-125

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 79-125 seeks to have penalties assessed for eight alleged violations, none of which were the subject of the hearing held in 1979. Under the settlement agreement, respondent would pay reduced penalties of $443 instead of the penalties totaling $618 proposed by the Assessment Office. The motion for approval of settlement (pp. 14; 23-26) discusses each of the eight alleged violations in detail. All of them were from moderately serious to serious and each was accompanied by at least ordinary negligence. Therefore, the primary reason for the parties' agreement to reduce the penalties in this docket number is that respondent is in a difficult financial condition. That has been the primary reason for the fact that I assessed low penalties in the portion of this decision which was devoted to the contested issues and those findings support the parties' settlement agreement which I find should be approved as to Docket No. KENT 79-125.

Docket No. KENT 79-151

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 79-151 seeks to have a civil penalty assessed for a single violation of section 75.400. Under the settlement agreement, respondent would pay the full penalty of $445 proposed by the Assessment Office. The motion for approval of settlement (p. 27) states that this alleged violation of section 75.400 was not considered at the hearing held in 1979. While it is true that Inspector McClanahan, who wrote the citation and order involved in Docket No. KENT 79-151, did not testify at the hearing held in 1979, some of the testimony at the 1979 hearing did show that one of respondent's owners and Inspector McClanahan had had an altercation which caused the co-owner to order the inspector off of mine property (Tr. 782-783).

Inasmuch as the hearing was never reconvened so that the inspector could give his version of the facts which led to the altercation, I am not making any findings about the merits of the dispute between the inspector and one of respondent's owners, but I think that the testimony as to the respondent's version of the controversy should be mentioned in view of the fact that the motion for approval of settlement (p. 28) primarily bases MSHA's refusal to reduce the proposed penalty in this instance on the fact that respondent declined to allow the inspector to come on mine property to determine whether the alleged violation of section 75.400 had been abated. The fact that respondent has agreed to pay a rather high penalty for what would otherwise have been considered to be a moderately serious violation is sufficient reason to approve the settlement agreement with respect to the violation of section 75.400 alleged in Docket No. KENT 79-151.

Docket No. KENT 80-28

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 80-28 seeks to have penalties assessed for two alleged violations. Under the settlement agreement, respondent would pay reduced penalties totaling $360 instead of the penalties of $650 proposed by the Assessment Office. Respondent has agreed to pay the full amount of $60 proposed by the Assessment Office with respect to an alleged violation of section 75.1725. The other alleged violation related to a charge that respondent had violated its ventilation, methane and dust-control plan by failing to install a proper seal at a point where the operator had cut into an abandoned mine. Respondent had constructed a seal made of cinder blocks, but the seal was required to be made of concrete blocks and be provided with a water seal. It was necessary for a withdrawal order to be issued before the violation was abated. The motion for approval of settlement (p. 30) indicates that MSHA agreed to reduce the proposed penalty proposed by the Assessment Office from $590 to $300 primarily for the reason that respondent is in a difficult financial condition. I find that adequate reasons have been given for approving the settlement agreement with respect to the Petition filed in Docket No. KENT 80-28.

Docket No. KENT 80-31

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 80-31 seeks to have penalties assessed for 17 alleged violations. Under the settlement agreement, respondent would pay the total penalties of $772 proposed by the Assessment Office. The Proposed Assessment sheet in this docket indicates that the Assessment Office had current information about respondent's size at the time the penalties here involved were determined under the formula provided for in 30 C.F.R. § 100.3. The Assessment Office assigned penalty points based on a finding that respondent is a very small operator. The Assessment Office found that ordinary negligence was associated with all of the 17 alleged violations and that all of them were either moderately serious or serious. The motion for approval of settlement states that MSHA's counsel considers several of the violations to be serious enough to warrant assessment of penalties larger than those proposed by the Assessment Office, but MSHA's counsel states that he agreed to settle all of the alleged violations at the amounts proposed by the Assessment Office under the criterion that payment of large penalties would have a very adverse effect on respondent's ability to continue in business. I find that adequate reasons have been shown to approve the settlement agreed upon as to the 17 violations alleged in Docket No. KENT 80-31.

Docket No. KENT 80-32

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 80-32 seeks to have penalties assessed for four alleged violations. In this docket, the Assessment Office also rated respondent as operating a very small business and proposed low penalties totaling $200 based on findings that each violation was associated with ordinary negligence and was moderately serious or serious. Under the settlement agreement, respondent would pay penalties totaling $173. The only penalty which was reduced below the amount proposed by the Assessment Office is for a violation of section 75.316 alleged in Citation No. 703939 dated April 30, 1979. As to that violation, which was based on the inspector's charge that only 2 of 24 water sprays on the continuous-mining machine were operable, the motion for approval of settlement states that the reduction from a proposed penalty of $72 to a settlement penalty of $45 was based on respondent's difficult financial condition. I find that an adequate reason has been given for approving the settlement agreed upon in Docket No. KENT 80-32.

Docket No. KENT 80-33

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 80-33 seeks to have penalties assessed for six alleged violations. Under the settlement agreement, respondent would pay penalties totaling $340 instead of the penalties totaling $358 proposed by the Assessment Office. The only penalty reduced by the settlement agreement below the amount proposed by the Assessment Office relates to Citation No. 713703 dated May 14, 1979, alleging a violation of section 75.1725 because a shuttle car's brakes were inoperative. The Assessment Office proposed a penalty of $78 for the violation of section 75.1725. The motion for approval of settlement (p. 29) had agreed to settle a previous violation of section 75.1725, pertaining to a shuttle car's brakes, on the basis of a $60 penalty involving a very similar violation. The settlement agreement consistently agreed to reduce the $78 penalty proposed by the Assessment Office for this very similar violation to the same amount, that is, $60. MSHA's counsel agreed on a penalty of $60 in each instance because of respondent's poor financial condition. I find that the settlement agreement proposed in Docket No. KENT 80-33 should be approved for the reason stated above.

Docket No. KENT 80-68

The Petition for Assessment of Civil Penalty filed in Docket No. KENT 80-68 seeks penalties for seven alleged violations. Under the settlement agreement, respondent would pay total penalties of $439 instead of the total penalties of $560 proposed by the Assessment Office. The Assessment Office considered that all of the alleged violations were associated with ordinary negligence and considered all of the violations to be moderately serious or serious. The Assessment Office proposed a penalty of $140 for a permissibility violation alleged in Citation No. 713717 dated May 31, 1979. Since respondent's mine has never been known to liberate methane, permissibility violations have not been considered to be very serious in this proceeding. In this instance, however, the Assessment Office proposed a large penalty of $140 because the respondent failed to abate the violation in a timely manner which resulted in the issuance of a withdrawal order. The Assessment Office, therefore, assigned 10 penalty points under 30 C.F.R. § 100.3 because it believed that respondent had failed to demonstrate a good faith effort to achieve compliance. The motion for approval of settlement (p. 44) shows that MSHA's counsel would not agree to a reduction of that relatively large penalty because of respondent's lack of good faith abatement.

The settlement agreement indicates that MSHA's counsel agreed to reduce three of the seven violations by a total of $121. A reduction of $10 in the $60 penalty proposed for the violation of section 75.601 alleged in Citation No. 713719 dated May 31, 1979, was agreed upon because of respondent's poor financial condition (Motion, p. 45). A reduction of $46 in the penalty of $106 proposed for the violation of section 77.504 alleged in Citation No. 714047 dated June 11, 1979, was made in the settlement agreement because of respondent's poor financial condition (Motion, p. 46). Finally, a reduction of $65 was made in the penalty of $90 proposed for the violation of section 77.512 in Citation No. 714048 dated June 12, 1979, partly because of respondent's poor financial condition and partly because the condition described in Citation No. 714048 was also covered by the condition described in Citation No. 714047 for which respondent is paying a penalty of $60 (Motion, p. 47). I find that adequate reasons have been given for approving the settlement agreed upon by the parties for the violations alleged by the Petition filed in Docket No. KENT 80-68.

Summary of Assessments and Conclusions

(1) On the basis of all the evidence received at the hearing held in this proceeding in October 1979 and the parties' motion for approval of settlement filed on October 15, 1980, the following civil penalties should be assessed:

Docket No. PIKE 78-308-P

Notice No. 3 EDF (7-40) 7/15/77 § 75.326 .. (Contested) ..	$	15.00
Notice No. 4 EDF (7-41) 7/15/77 § 75.200 .. (Contested) ..		50.00
Notice No. 1 RM (7-42) 7/14/77 § 75.200 ... (Settled)		106.00
Notice No. 2 RM (7-43) 7/14/77 § 75.200 ... (Settled)		106.00
Notice No. 3 RM (7-44) 7/14/77 § 75.400 ... (Settled)		61.00
Notice No. 4 RM (7-45) 7/14/77 § 75.403 ... (Dismissed) ..		0.00
Notice No. 1 RM (7-46) 7/15/77 § 75.302-1 . (Settled)		34.00
Notice No. 2 RM (7-47) 7/15/77 § 75.403 ... (Dismissed) ..		0.00
Notice No. 3 RM (7-48) 7/15/77 § 75.400 ... (Settled)		102.00
Notice No. 1 RM (7-49) 7/19/77 § 75.326 ... (Settled)		46.00
Notice No. 2 RM (7-50) 7/19/77 § 75.316 ... (Settled)		36.00
Notice No. 2 RM (7-52) 7/20/77 § 75.301-1 . (Settled)		43.00
Total Contested and Settled Penalties in Docket No. PIKE 78-308-P	$	599.00

Docket No. PIKE 78-451-P
(All Contested)

Notice No. 1 JM (7-57) 8/18/77 § 75.200	$	100.00
Total Contested (None Settled) Penalties in Docket No. PIKE 78-451-P	$	100.00

Docket No. PIKE 78-458-P
(All Contested)

Notice No. 3 VEH (7-50) 8/1/77 § 75.400 .. (Dismissed) ...	$	0.00
Notice No. 1 EDF (7-63) 10/12/77 § 75.400		15.00
Notice No. 2 EDF (7-64) 10/12/77 § 75.400		15.00
Notice No. 3 EDF (7-65) 10/12/77 § 75.503		15.00
Notice No. 5 EDF (7-67) 10/12/77 § 75.400		15.00
Notice No. 6 EDF (7-68) 10/12/77 § 75.807		25.00
Notice No. 7 EDF (7-69) 10/12/77 § 75.200		50.00
Notice No. 8 EDF (7-70) 10/12/77 § 75.507		20.00

Notice No. 1 EDF (7-71) 10/13/77 § 75.1725		5.00
Notice No. 1 EDF (7-72) 10/14/77 § 77.1605(k)		20.00
Notice No. 1 EDF (7-73) 10/17/77 § 75.604		15.00
Notice No. 2 EDF (7-74) 10/17/77 § 75.200 .. (Dismissed) .		0.00
Notice No. 1 EDF (7-75) 10/18/77 § 75.316		5.00
Notice No. 2 EDF (7-76) 10/18/77 § 75.316		15.00
Notice No. 2 EDF (7-78) 10/20/77 § 75.1101-1		5.00
Notice No. 3 EDF (7-79) 10/20/77 § 75.1102		15.00
Notice No. 4 EDF (7-80) 10/20/77 § 75.516-2		15.00
Total Contested (None Settled) Penalties in Docket No. PIKE 78-458-P	$	250.00

Docket No. PIKE 79-25-P

(All Settled)

Citation No. 63654 6/19/78 § 75.1722	$	45.00
Citation No. 63655 6/19/78 § 75.200		50.00
Citation No. 63656 6/19/78 § 75.200		35.00
Citation No. 63657 6/19/78 § 75.1722		45.00
Citation No. 63658 6/19/78 § 75.503		50.00
Citation No. 63659 6/19/78 § 75.313		35.00
Citation No. 63660 6/19/78 § 75.301-4		46.00
Citation No. 63801 6/19/78 § 75.523-2		60.00
Citation No. 63802 6/19/78 § 75.503		50.00
Citation No. 63803 6/19/78 § 75.503		50.00
Citation No. 63804 6/19/78 § 75.1704-2(d)		50.00
Citation No. 63805 6/19/78 § 75.1710		50.00
Citation No. 63806 6/19/78 § 75.1710		50.00
Citation No. 63807 6/19/78 § 75.1722		49.00
Citation No. 63809 6/19/78 § 75.1100-2		50.00
Citation No. 63810 6/19/78 § 75.316		50.00
Citation No. 63811 6/20/78 § 75.1101-6		60.00
Citation No. 63812 6/20/78 § 75.316		50.00
Citation No. 63813 6/20/78 § 75.316		50.00
Citation No. 63814 6/20/78 § 75.503		35.00
Total Settled (None Contested) in Docket No. PIKE 79-25-P	$	960.00

Docket No. PIKE 79-50-P

(All Settled)

Citation No. 63815 6/20/78 § 75.503	$	35.00
Citation No. 63816 6/20/78 § 75.603		50.00
Total Settled (None Contested) in Docket No. PIKE 79-50-P	$	85.00

Docket No. PIKE 79-77-P

Notice No. 1 EDF (7-81) 10/31/77 § 75.1100-2 (Dismissed)	$	0.00
Citation No. 65863 3/21/78 § 75.601 ...... (Dismissed)...		0.00

Citation No. 65864 3/21/78 § 75.503 (Contested)		15.00
Citation No. 65865 3/21/78 § 75.503 (Contested)		25.00
Citation No. 65866 3/21/78 § 75.503 (Contested)		25.00
Citation No. 65867 3/22/78 § 77.1605 (Contested)		1.00
Citation No. 63817 6/21/78 § 75.1704 (Settled)		40.00
Total Contested and Settled Penalties in Docket No. PIKE 79-77-P	$	106.00

Docket No. PIKE 79-99-P

Order No. 65862 3/15/78 § 75.400 (Contested)	$	100.00
Order No. 65862 3/15/78 § 75.1725 (Contested)		5.00
Order No. 65862 3/15/78 § 75.1101-1 (Contested)		25.00
Citation No. 63808 6/19/78 § 75.400 (Settled)		40.00
Total Contested and Settled Penalties in Docket No. PIKE 79-99-P	$	170.00

Docket No. KENT 79-1
(All Contested)

Citation No. 64600 11/16/78 § 75.1722(b)	$	25.00
Total Contested (None Settled) Penalties in Docket No. KENT 79-1	$	25.00

Docket No. KENT 79-125
(All Settled)

Citation No. 64310 9/18/78 § 75.1710	$	52.00
Citation No. 64311 9/18/78 § 75.503		50.00
Citation No. 64312 9/18/78 § 75.400		40.00
Citation No. 64313 9/18/78 § 75.515		56.00
Citation No. 64314 9/18/78 § 75.515		56.00
Citation No. 64315 9/18/78 § 75.601		75.00
Citation No. 64330 9/18/78 § 75.400		66.00
Citation No. 64331 9/19/78 § 75.512		48.00
Total Settled (None Contested) Penalties in Docket No. KENT 79-125	$	443.00

Docket No. KENT 79-151
(All Settled)

Citation No. 64969 12/13/78 § 75.400	$	445.00
Total Settled (None Contested) Penalties in Docket No. KENT 79-151	$	445.00

Docket No. KENT 80-28
(All Settled)

Citation No. 703899 4/26/79 § 75.1725	$	60.00
Citation No. 703940 5/4/79 § 75.316		300.00
Total Settled (None Contested) Penalties in Docket No. KENT 80-28	$	360.00

Docket No. KENT 80-31
(All Settled)

Citation No. 703896 4/26/79 § 77.701	$	52.00
Citation No. 703898 4/26/79 § 77.701		60.00
Citation No. 703900 4/26/79 § 77.506		40.00
Citation No. 703930 4/26/79 § 75.1725		52.00
Citation No. 703931 4/26/79 § 75.400		40.00
Citation No. 703932 4/26/79 § 75.316		40.00
Citation No. 703933 4/26/79 § 75.200		56.00
Citation No. 703935 4/26/79 § 75.1103		52.00
Citation No. 703961 4/26/79 § 75.523		34.00
Citation No. 703936 4/30/79 § 75.200		36.00
Citation No. 703937 4/30/79 § 75.200		56.00
Citation No. 703962 4/30/79 § 75.604		38.00
Citation No. 703963 4/30/79 § 75.604		56.00
Citation No. 703964 4/30/79 § 75.503		38.00
Citation No. 703965 4/30/79 § 75.503		30.00
Citation No. 703967 4/30/79 § 75.523		36.00
Citation No. 703968 4/30/79 § 75.1722		56.00
Total Settlement (None Contested) Penalties in Docket No. KENT 80-31	$	772.00

Docket No. KENT 80-32
(All Settled)

Citation No. 703897 4/26/79 § 77.1605(a)	$	40.00
Citation No. 703934 4/26/79 § 75.1100-2		52.00
Citation No. 703938 4/30/79 § 75.400		36.00
Citation No. 703939 4/30/79 § 75.316		45.00
Total Settled (None Contested) Penalties in Docket No. KENT 80-32	$	173.00

Docket No. KENT 80-33
(All Settled)

Citation No. 713455 5/2/79 § 75.604	$	60.00
Citation No. 713456 5/2/79 § 75.200		66.00
Citation No. 713703 5/14/79 § 75.1725		60.00
Citation No. 713707 5/14/79 § 75.603		60.00
Citation No. 713708 5/14/79 § 75.503		34.00
Citation No. 713710 5/14/79 § 75.200		60.00
Total Settled (None Contested) Penalties in Docket No. KENT 80-33	$	340.00

Docket No. KENT 80-68
(All Settled)

Citation No. 713717 5/31/79 § 75.503	$	140.00
Citation No. 713718 5/31/79 § 75.1177		52.00

Citation No. 713719 5/31/79 § 75.601		50.00
Citation No. 713720 5/31/79 § 77.505		52.00
Citation No. 714581 5/31/79 § 77.700		60.00
Citation No. 714047 6/11/79 § 77.504		60.00
Citation No. 714048 6/11/79 § 77.512		25.00
Total Settled (None Contested) Penalties in Docket No. KENT 80-68	$	439.00
Total Contested and Settled Penalties in This Proceeding	$	5,267.00

(2) The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 78-308-P should be dismissed insofar as it seeks to have penalties assessed for the violations of section 75.403 alleged in Notice Nos. 4 RM (7-45) and 2 RM (7-47) dated July 14 and July 15, 1977, respectively, because the motion for approval of settlement (p. 9) states that the analyses of the dust samples required to prove those alleged violations are unavailable.

(3) The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 78-458-P should be dismissed to the extent that it seeks assessment of a penalty for the violation of section 75.400 alleged in Notice No. 3 VEH (7-50) dated August 1, 1977, because MSHA's counsel stated at the hearing that the inspector who wrote Notice No. 3 VEH was unavailable to testify in support of the alleged violation (Tr. 119).

(4) The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 78-458-P should also be dismissed to the extent that it seeks to have a penalty assessed for the violation of section 75.200 alleged in Notice No. 2 EDF (7-74) dated October 17, 1977, because of MSHA's failure to prove that the violation occurred.

(5) The Petition for Assessment of Civil Penalty filed in Docket No PIKE 79-77-P should be dismissed to the extent that it seeks to have a penalty assessed for the violation of section 75.1100-2 alleged in Notice No. 1 EDF (7-81) dated October 31, 1977, because of MSHA's failure to prove that the violation occurred.

(6) The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-77-P should also be dismissed to the extent that it seeks to have a penalty assessed for the violation of section 75.601 alleged in Citation No. 65863 dated March 21, 1978, because of MSHA's failure to prove that the violation occurred.

(7) Respondent, as the operator of the Nos. 2, 3, 4, and 6 Mines involved in this proceeding, is subject to the Act and to the regulations promulgated thereunder.

WHEREFORE, it is ordered:

(A) Pursuant to the parties' settlement agreement and to my decision concerning the contested issues, Little Bill Coal Company is ordered, within

90 days from the date of this decision, to pay civil penalties totaling $5,267.00, as summarized above in paragraph (1).

(B) The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 78-308-P is dismissed to the extent and for the reason given in paragraph (2) above.

(C) The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 78-458-P is dismissed to the extent and for the reasons given in paragraphs (3) and (4) above.

(D) The Petition for Assessment of Civil Penalty filed in Docket No. PIKE 79-77-P is dismissed to the extent and for the reasons given in paragraphs (5) and (6) above.

(E) The motion for approval of settlement filed on October 15, 1980, is granted and the settlement agreement described therein is approved.

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

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Herman W. Lester, Jr., Esq., Attorney for Little Bill Coal Company, Inc., Combs and Lester, P.S.C., 207 Caroline Avenue, P.O. Box 551, Pikeville, KY 41501 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

DEC 17 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	Civil Penalty Proceeding Docket No. VA 80-84 A.C. No. 44-00294-03032V
v.	
EASTOVER MINING COMPANY, Respondent	Virginia No. 1 Mine

DECISION

Appearances: Catherine Oliver, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Karl S. Forester, Esq., Harlan, Kentucky, for Respondent.

Before: Judge James A. Laurenson

JURISDICTION AND PROCEDURAL HISTORY

This is a proceeding filed by the Secretary of Labor, Mine Safety and Health Administration (hereinafter MSHA) under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) (hereinafter the Act), to assess a civil penalty against Eastover Mining Company (hereinafter Eastover) for a violation of a mandatory standard. The proposal for assessment of a civil penalty alleges a violation of 30 C.F.R. § 75.507 in that nonpermissible power connection points were located in return air.

The parties filed preliminary statements and a hearing was held in Abingdon, Virginia, on November 5, 1980. Inspector Herman Lucas testified on behalf of MSHA. Larry Baker, David Gilly, and Robert Jessee testified on behalf of Eastover. The parties submitted closing arguments at the hearing.

ISSUES

Whether Eastover violated the Act or regulations as charged by MSHA and, if so, the amount of the civil penalty which should be assessed.

APPLICABLE LAW

30 C.F.R. § 75.507 provides as follows: "Except where permissible power connections are used, all power connection points outby the last open crosscut shall be in intake air."

Section 110(i) of the Act, 30 U.S.C. § 820(i), provides in pertinent part as follows:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalties, the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

STIPULATIONS

The parties stipulated the following:

1. Eastover owns and operates Virginia No. 1 Mine, and both Eastover and the mine are subject to the jurisdiction of the Act.

2. The Administrative Law Judge has jurisdiction over this proceeding pursuant to the Act.

3. The subject order, No. 682886, and termination thereto, were properly served by a duly authorized representative of MSHA, Herman Lucas.

4. A copy of Order No. 682886 attached to the petition for adjudication of a civil penalty is an authentic copy of the original order.

5. The assessment of a civil penalty in this proceeding will not affect Eastover's ability to continue in business.

6. The pump control box which is the subject of Order No. 682886 was located in the last open crosscut of the 2 Right Section, which is a return airway.

7. The subject pump control box did not have permissible power connection points at the time the subject order was issued.

8. The computer printout reflecting the operator's history of violations is an authentic copy and may be admitted as a business record of MSHA.

9. The appropriateness of the penalty, if any, to the size of the coal operator's business should be determined based upon the fact that Virginia No. 1 Mine has an annual tonnage of 236,248 and Eastover has an annual tonnage of 1,679,965.

SUMMARY OF THE EVIDENCE

During the course of a spot inspection of Eastover's Virginia No. 1 Mine on September 12, 1979, MSHA inspector Herman Lucas issued an order of withdrawal pursuant to section 104(d)(1) of the Act for a violation of 30 C.F.R. § 75.507. The order in question alleged, in part, as follows: "Nonpermissible power connection points, Gorman Rupp water pump control box was being used in the last open crosscut in return air of 2 Right Section." As noted in the stipulations in this case, Eastover admits that the pump control box did not have permissible power connection points and was located in a return airway at the time the order was issued. However, Eastover contends that the pump control box was not energized at the time the order was issued. Hence, it asserts that there was no violation of the regulation and no civil penalty should be assessed.

Inspector Lucas testified that he did not know whether the pump was working or whether the pump control box was energized at the time he issued the order. He stated that he assumed that the pump control box was energized or that it had been energized previously. The inspector admitted that Robert Jessee, the assistant mine foreman and the operator's escort during this inspection, told him that the pump control box was not energized. Inspector Lucas did not attempt to make a determination whether the pump control box was energized. He stated that, in his opinion, if the equipment had never been energized, there would be no violation of the regulation.

Larry Baker, formerly Eastover's general mine foreman on the third shift, testified that he installed the pump on the shift prior to the one on which the order was issued. After he set the pump in water, he found that there was not enough cable to connect the pump to the power center. Since he could not complete the installation of the pump, he hung the nonpermissible pump control box on a roof bolt in return air to keep it out of the mud. He asserted that he was familiar with the regulation in question and would not have left the pump control box in the return air if it were energized.

Robert Jessee, Eastover's assistant mine foreman on the day shift, testified that he accompanied the inspector on the day in question. He testified that he told the inspector that the pump control box was not connected. He walked to the power center and confirmed the fact that the pump control box was not energized.

The undisputed evidence on the remaining issues indicate that energized, nonpermissible power connection points in return air could cause a methane explosion which could be fatal. At the time of the order, .1 to .2 percent methane was found at the working places in this section. This mine has a history of methane liberation. However, if the pump control box was not energized, it could not cause an explosion and the violation would not be serious. In May 1979, there was a violation of this regulation, 30 C.F.R. § 75.507, at this mine.

EVALUATION OF THE EVIDENCE

All of the testimony, exhibits, stipulations, and arguments of the parties have been considered. Eastover contends that the pump control box was not energized and, hence, no violation of the regulation occurred. The inspector admitted that he did not know whether the pump control box was energized at the time he issued this order. He assumed that it had been energized at some prior time in nonpermissible condition but testified that if the box had not been energized at any time since its placement in return air, no violation would occur. However, whether or not the pump control box was ever energized is irrelevant to a determination of whether the regulation was violated.

Eastover should be aware that its defense, that the nonpermissible power connnection points were not energized, is no defense to a charge of violation of 30 C.F.R. § 75.507. In Secretary of Labor v. Eastover Mining Company, Docket Nos. NORT 78-54-P and NORT 78-55-P (November 8, 1978), Judge Steffey rejected Eastover's defense as follows:

> Since section 75.507 prohibits the placing of nonpermissible power connection points in return air outby the last open crosscut, I think the inspector is correct in stating that respondent violated section 75.507 by placing the charger in return air even though the charger was not being used at the time Order No. 1 MLH was written.

Eastover did not seek review of that decision.

Thereafter, in Secretary of Labor v. Southern Ohio Coal Company, Docket Nos. VINC 79-109-P, et al. (October 19, 1979), Judge Koutras rejected the same defense to the same regulation as follows:

> I find and conclude that the petitioner has established a violation as charged in the citation by a preponderance of the evidence. Respondent's contention that petitioner must first establish that the battery charger unit in question was energized in order to support a violation of section 75.507 is rejected, notwithstanding the inspector's practice of not issuing citations if it is not energized. I find no such requirement in the standard and respondent has not persuaded me otherwise. The question of whether the unit was energized at the time of the inspection goes to the question of gravity and may not serve as an absolute defense to the violation. The citation is AFFIRMED.

The Federal Mine Safety and Health Review Commission denied the petition for discretionary review.

In the instant case, Eastover cites no legal precedent in suppport of its defense. As noted above, the prior decisions of judges have held that the placement of nonpermissible power connection points in return air is a violation of 30 C.F.R. § 75.507 even if the units are not energized. I conclude that the evidence of record establishes a violation of 30 C.F.R. § 75.507. However, I also find that the pump control box in controversy had not been energized at the time the order issued.

ASSESSMENT OF CIVIL PENALTY

MSHA proposed that a civil penalty in the amount of $2,500 be assessed for this violation. I have found that there was a prior violation of the same standard, 30 C.F.R. § 75.507, cited in this case, in this same mine in May 1979. Eastover was negligent in that it knew or should have known of this violation since the area where the violation occurred had been preshifted. This mine liberates methane and had the control box been energized, an explosion source would have been present. However, I have found that the control box was not energized at the time the order was issued, nor was it ever energized at the point at which it was found in return air. The gravity of the violation was therefore much less than was assumed by MSHA when it proposed a penalty of $2,500.

Based upon all of the evidence of record and the criteria set forth in section 110(i) of the Act, I conclude that a civil penalty in the amount of $500 should be imposed for the violation found to have occurred.

ORDER

WHEREFORE IT IS ORDERED that Eastover pay the sum of $500 within 30 days of the date of this decision as a civil penalty for the violation of 30 C.F.R. § 75.507.

James A. Laurenson, Judge

Issued:

Distribution by Certified Mail:

Catherine Oliver, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480, Gateway Building, 3535 Market Street, Philadelphia, PA 19104

Karl S. Forester, Esq., Forester & Forester, P.O. Box 935, Harlan, KY 40831

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DEC 18 1980

PENN ALLEGH COAL COMPANY, INC.,	Contest of Citation
Contestant	
v.	Docket No. PENN 80-271-R
SECRETARY OF LABOR,	Citation No. 840677
MINE SAFETY AND HEALTH	June 23, 1980
ADMINISTRATION (MSHA),	
	Allegheny No. 3 Mine
and	
UNITED MINE WORKERS OF AMERICA,	
Respondents	
SECRETARY OF LABOR,	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	
ADMINISTRATION (MSHA),	Docket No. PENN 80-275
Petitioner	A.C. No. 36-05691-03012
v.	
PENN ALLEGH COAL COMPANY, INC.,	Allegheny No. 3 Mine
Respondent	

DECISION

Appearances: Ronald S. Cusano, Esq., Rose, Schmidt, Dixon, Hasley, Whyte and Hardesty, Pittsburgh, Pennsylvania, for Penn Allegh Coal Company, Inc.;
Covette Rooney, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor.

Before: Judge Melick

Hearings were held on these cases in Pittsburgh, Pennsylvania, on November 18, 1980, pursuant to sections 105(d) and 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act". The general issue to be first resolved is whether Penn Allegh Coal Company, Inc. (Penn Allegh), violated the regulation cited in both cases, to wit: 30 C.F.R. § 70.101. At hearing, Penn Allegh filed a motion for summary decision. My bench decision granting that motion appears below with only non-substantive corrections and is affirmed as my final decision at this time.

Under Commission Rule 64(b), 29 C.F.R. § 2700.64(b), a motion for a summary decision shall be granted only if the entire record including the pleadings, depositions, answers to interrogatories, admissions and affidavits shows, (1) that there is no genuine issue as to any material fact and, (2) that the moving party is entitled to summary decision as a matter of law. Based on the agreed stipulation of facts submitted in this case, I conclude that, indeed, there is no genuine issue as to any material fact and that the operator in this case, Penn Allegh Coal Company, Inc., is entitled as a matter of law to a summary decision vacating the citations at issue.

There are two citations before me each charging one violation of the standard at 30 C.F.R. § 70.101. That standard, which I will refer to as "the reduced dust standard," provides in part as follows:

> When the concentration of respirable dust in the mine atmosphere _of any working place_ contains more than five percent quartz, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere to which each miner _in such working place_ is exposed at or below a concentration of respirable dust, expressed in milligrams per cubic meter of air, computed by dividing the percent of quartz into the number ten: [Emphasis added.]

I have emphasized the language "working place" as utilized in the standard because that language is critical to the decision in this case and it is the language upon which this case is to be decided. The term "working place" is defined in the regulations at 30 C.F.R § 70.2(e) as the area of a coal mine inby the last open crosscut. The term "working place" as used in the standard cited in these cases, that is, the reduced dust standard, is clearly governed by this definition. No one disputes this. I conclude, therefore, that the operator is required to maintain the reduced respirable dust levels required by section 70.101 only in that same specific area located "inby the last open crosscut" _i.e._, the same "working place" where the respirable dust has been found to contain more than 5 percent quartz.

The stipulated and agreed facts of this case show that the samples taken to establish that the concentration of respirable dust contained more than 5 percent quartz were taken between January 2 and January 9, 1980, in the north main section and specifically the area designated on the operator's mine map which is in evidence as Exhibit No. 1 as the working places in the area adjacent to the letter "A."

On the other hand, the samples on which the violations cited in the two cases before me today were based were actually taken in the 2 right section which has been identified on the operator's mine map (Exh. No. 1) as the area designated with an orange color with the date February 1980, adjacent to it, the area designated by a green color with the date March 1980, adjacent to it, the area designated by the color red with the date April 1980, appearing adjacent to it, the color brown with the date May 1980, appearing adjacent to it, and the color yellow with the date June 1980, appearing adjacent to it.

According to the stipulation, the "working places" where the quartz concentration was determined and the "working places" where the alleged violations were found were no closer than 2,000 feet apart. Under the circumstances, it is clear beyond all doubt that the "working places" at which the respirable dust having more than 5 percent quartz content was found and relied upon in these cases were not the same "working places" at which the violations were cited. There has, therefore, been no violation of the cited standard and, accordingly, the citations before me must be vacated.

ORDER

Citation Nos. 9901143 and 840677 are hereby VACATED. The civil penalty proceeding, Docket No. PENN 80-275, is DISMISSED.

Gary Melick
Administrative Law Judge

Distribution:

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Harrison B. Combs, Esq., United Mine Workers of America, 900 15th Street, NW., Washington, DC 20005 (Certified Mail)

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DEC 18 1980

CLIMAX MOLYBDENUM COMPANY,	Applications for Review
Applicant	
v.	Docket No. DENV 78-553-M
SECRETARY OF LABOR,	Citation No. 331733
MINE SAFETY AND HEALTH	July 27, 1978
ADMINISTRATION (MSHA),	
Respondent	Docket No. DENV 78-554-M
	Citation No. 331744
CLIMAX MOLYBDENUM WORKERS,	July 27, 1978
LOCAL NO. 2-24410, OIL, CHEMICAL	
AND ATOMIC WORKERS INTERNATIONAL	Docket No. DENV 78-555-M
UNION,	
Respondent	Citation No. 331747
	July 28, 1978
	Climax Mine

SECRETARY OF LABOR,	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	
ADMINISTRATION (MSHA),	Docket No. WEST 79-340-M
Petitioner	A/O No. 05-00354-05025
v.	
	Climax Mine
CLIMAX MOLYBDENUM COMPANY,	
Respondent	

DECISION

Appearances: Charles W. Newcom, Esq., Sherman and Howard, Denver, Colorado, for Climax Molybdenum Company;
Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Mine Safety and Health Administration;
David Jones, President, and James Kasic, Law Clerk, Climax Molybdenum Workers, Local No. 2-24410, Oil, Chemical and Atomic Workers International Union, Leadville, Colorado, for the Union.

Before: Judge Cook

I. Procedural Background

On August 28, 1978, Climax Molybdenum Company (Climax) filed applications for review in Docket Nos. DENV 78-553-M, DENV 78-554-M and DENV 78-555-M pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978) (1977 Mine Act). Answers were filed by the Mine Safety and Health Administration (MSHA) on September 7, 1978. On October 31, 1978, the Climax Molybdenum Workers, Local No. 2-24410, Oil, Chemical and Atomic Workers International Union (Union) elected party status.

On September 12, 1978, a notice of hearing was issued scheduling the application for review proceedings for hearing on November 28, 1978, in Denver, Colorado. On November 8, 1978, Climax filed motions for continuance and commencement of discovery, and on November 9, 1978, filed a motion for a prehearing conference for the determination of issues. The three motions were granted. The requested prehearing conference was held on December 1, 1978, in Arlington, Virginia. Thereafter, on January 5, 1979, Climax filed amended applications for review.

On May 5, 1979, a notice of hearing was issued scheduling the application for review proceedings for hearing on November 6, 1979, in Denver, Colorado. On September 26, 1979, Climax and MSHA filed a joint motion for continuance. The motion was granted on October 3, 1979, and the cases were continued to January 15, 1980, in Denver, Colorado. On January 2, 1980, Climax filed a motion for continuance. The motion was granted on January 7, 1980, and the hearing was continued to March 11, 1980, in Silverthorn and Breckenridge, Colorado.

Extensive discovery was authorized and various telephone conferences were held at various stages of the proceedings.

The above-captioned civil penalty proceeding was filed by MSHA on September 24, 1979, pursuant to section 110(a) of the 1977 Mine Act alleging 12 violations of various provisions of the Code of Federal Regulations. The three citations at issue in the above-captioned application for review proceedings are also at issue in the civil penalty case. Climax filed its answer on October 15, 1979, and on October 24, 1979, the case was assigned to Administrative Law Judge John J. Morris of the Commission's Office of Administrative Law Judges located in Denver, Colorado. On January 18, 1980, MSHA filed a motion to withdraw the proposal for a penalty as relates to Citation Nos. 333241, 333339 and 333340. MSHA's motion was granted by Judge Morris on February 25, 1980.

Thereafter, Climax moved to transfer the civil penalty case to the undersigned and such transfer occurred on March 4, 1980. On March 7, 1980, a notice of hearing was issued consolidating the case with the above-captioned application for review proceedings and scheduling it for hearing on March 11, 1980, in Silverthorn Colorado.

The hearing was held on March 11, 1980, in Silverthorn, Colorado, and on March 12, 1980, in Breckenridge, Colorado. Representatives of Climax and MSHA appeared and participated on both days. A representative of the Union appeared on March 11, 1980, and limited his participation to the delivery of a brief opening statement.

At the beginning of the hearing, MSHA filed a written motion in Docket No. WEST 79-340-M to withdraw the proposal for a penalty as relates to all remaining citations except the three at issue in the application for review proceedings. An order granting the motion is contained in this decision.

At the conclusion of the hearing, an agreement was reached addressing the posthearing filing of definitions contained in certain treatises. On April 28, 1980, Climax filed copies of definitions contained in treatises entitled, IEEE Standard Dictionary of Electrical and Electronic Terms, A Dictionary of Mining, Mineral, and Related Terms [U.S. Department of Interior], and the National Electrical Code. These exhibits were marked for identification as Exhibits 0-9, 0-10, and 0-11, respectively, and received in evidence on June 13, 1980.

Climax and MSHA filed posthearing briefs on May 16, 1980, and June 13, 1980, respectively. Climax filed a reply brief on July 1, 1980. The Union did not file a posthearing brief.

The transcript of the hearing was received by the undersigned Administrative Law Judge on June 4, 1980. Thereafter, it was discovered that the court reporting company had failed to forward with the transcript a total of 26 exhibits received in evidence during the hearing, i.e., Joint Exhibits 1-A through 1-H, 2-A through 2-I, 3-A through 3-H, and Exhibit 0-4. By a letter dated August 14, 1980, the three parties were apprised of this and were requested to submit substitute copies of the missing exhibits in conjunction with an appropriate stipulation. Additionally, the representatives of Climax and MSHA were directed to obtain the signature of the Union's representative on the stipulation filed at the hearing on March 11, 1980. Climax filed copies of Joint Exhibits 1-A through 1-H, 2-A through 2-I, and 3-A through 3-H, on September 8, 1980. The attached cover letter states that the parties "are in agreement that copies of these exhibits be placed in the record as substitutes for the missing joint exhibits. They bear identical numbers to the original exhibits. We are also in agreement that the cable which you have in your possession be substituted for missing Exhibit 0-4."

On September 9, 1980, MSHA filed a statement agreeing to the substitution. To date, the Union has not filed a written statement agreeing to the substitution. The Union did not introduce any exhibits in evidence during the hearing. However, copies of Climax's September 8, 1980, cover letter and MSHA's September 9, 1980, filing were served on the Union, and the Union has not filed a statement in opposition to the substitution. Accordingly, the substitution will be made and the exhibits will be considered in deciding these cases.

Additionally, on September 15, 1980, an agreement to the March 11, 1980, stipulation bearing the Union representative's signature was filed.

II. Violations Charged in Docket No. WEST 79-340-M

Citation No.	Date	30 C.F.R. Standard
331733	July 27, 1978	57.12-82
331744	July 27, 1978	57.12-82
331747	July 28, 1978	57.12-10
333300	August 7, 1978	57.12-28
333331	November 27, 1978	57.12-1
333241	December 27, 1978	57.12-1
333242	December 27, 1978	57.12-25
333246	December 27, 1978	57.12-13
333335	December 27, 1978	57.12-13
333336	December 27, 1978	57.12-13
333339	December 27, 1978	57.12-1
333340	December 27, 1978	57.12-1

III. Witnesses and Exhibits

A. Witnesses

MSHA called as its witnesses Lawrence P. Filek, an electrical engineer at MSHA's Denver Technical Support Center; William S. Vilcheck, an electrical engineer at MSHA's Pittsburgh Technical Support Center; and James Atwood, a Federal mine inspector.

Climax called as its witnesses Edwin D. Matheson, an electrician in the Storke locomotive shop of the Climax Mine and Chairman of the International Brotherhood of Electrical Workers, Local No. 1823; Harden H. Williams, an electrical foreman at the Climax Mine; George E. Pupera, electrical superintendent at the Climax Mine; and Dr. Fred Leffler, Associate Professor of Electrical Engineering at the Colorado School of Mines.

B. Exhibits

1. The following joint exhibits were introduced in evidence:

Joint Exhibit 1-A is a copy of Citation No. 331733, July 27, 1978, 30 C.F.R. § 57.12-82.

Joint Exhibits 1-B through 1-E are copies of various subsequent action forms pertaining to Joint Exhibit 1-A granting various extensions of the time period for abatement.

Joint Exhibit 1-F is a copy of the inspector's statement pertaining to Joint Exhibit 1-A.

Joint Exhibit 1-G is a copy of the termination of Joint Exhibit 1-A.

Joint Exhibit 1-H is a copy of Inspector Atwood's handwritten notes pertaining to Joint Exhibit 1-A.

Joint Exhibit 2-A is a copy of Citation No. 331744, July 27, 1978, 30 C.F.R. § 57.12-82.

Joint Exhibits 2-B, 2-D, 2-E, and 2-F are copies of various subsequent action forms pertaining to Joint Exhibit 2-A granting various extensions of the time period for abatement.

Joint Exhibit 2-C is a copy of a modification of Joint Exhibit 2-B.

Joint Exhibit 2-G is a copy of the inspector's statement pertaining to Joint Exhibit 2-A.

Joint Exhibit 2-H is a copy of the termination of Joint Exhibit 2-A.

Joint Exhibit 2-I is a copy of Inspector Atwood's handwritten notes pertaining to Joint Exhibit 2-A.

Joint Exhibit 3-A is a copy of Citation No. 331747, July 28, 1978, 30 C.F.R. § 57.12-10.

Joint Exhibits 3-B through 3-E are copies of various subsequent action forms pertaining to Joint Exhibit 3-A granting various extensions of the time period for abatement.

Joint Exhibit 3-F is a copy of the inspector's statement pertaining to Joint Exhibit 3-A.

Joint Exhibit 3-G is a copy of the termination of Joint Exhibit 3-A.

Joint Exhibit 3-H is a copy of Inspector Atwood's handwritten notes pertaining to Joint Exhibit 3-A.

Joint Exhibit 4 is a booklet published by Climax containing general information about the Climax Mine.

Joint Exhibit 5 is a booklet published by Climax entitled "This is Climax Molybdenum."

Joint Exhibit 6 lists the type of electical cables at issue in these proceedings.

Joint Exhibits 7 through 14 are photographs.

Joint Exhibit 15 is a copy of a memorandum dated January 22, 1975, from William W. Carlson, Mining Engineer, Metal and Nonmetal Mine Health and Safety, Duluth Subdistrict, Marquette, Michigan, to A. Z. Dimitroff, Chief, Denver Technical Support Center, Denver, Colorado, addressing the subject of electrocution hazard potential when powerlines are installed in contact with water and air lines.

Joint Exhibit 16 is a copy of a memorandum dated January 30, 1975, from the Electrical Engineer, Industrial Safety Group, to the Chief of the Denver Technical Support Center addressing powerlines in contact with metal pipelines.

Joint Exhibit 17 is a copy of a memorandum dated January 31, 1975, from the Chief of the Denver Technical Support Center, to William W. Carlson replying to Joint Exhibit 15.

Joint Exhibit 18 is a copy of the Nelson/Shepich Memorandum of February 21, 1975.

Joint Exhibit 19 is a copy of a memorandum dated August 19, 1975, from the Chief of the Mine Electrical Systems Group, to the Assistant Administrator for Metal and Nonmetal Mine Health and Safety containing an opinion on the interpretation of mandatory safety standard 30 C.F.R. § 57.12-82.

Joint Exhibit 20 is a copy of a memorandum dated February 10, 1978, from the Electrical Engineer, Mine Electrical Systems Branch, to Allen D. Stoutenger, Mining Engineer, Rocky Mountain Subdistrict Office, Lakewood, Colorado, addressing mandatory safety standard 30 C.F.R. § 57.12-82.

2. MSHA introduced the following exhibits in evidence:

M-1 through M-6 are photographs.

M-7 is a copy of an extract from the National Electrical Code.

M-8 is a copy of an extract from the American Electrician's Handbook.

3. Climax introduced the following exhibits in evidence:

O-1 is a booklet published by Climax entitled "Technical Information."

O-2 is the affidavit of Otto W. Drager.

O-3 is a copy of an extract from the National Electrical Code.

O-4 is a segment of electrical cable.

O-5 is a copy of an extract from the Anixter Brothers, Inc., supply catalog containing detailed specifications for the cables listed in Joint Exhibit 6.

O-6 is a copy of Dr. Leffler's resume.

0-7 contains copies of pages from the 1978 Annual Book of ASTM Standards.

0-8 is a copy of an extract from the American Electrician's Handbook.

0-9 contains copies of pages from the IEEE Standard Dictionary of Electrical and Electronics Terms.

0-10 contains copies of pages from A Dictionary of Mining, Mineral, and Related Terms.

0-11 is a copy of an extract from the 1978 National Electrical Code.

IV. Issues

A. The following issues are presented in the above-captioned application for review proceedings:

1. Whether the term "powerline," as used in 30 C.F.R. § 57.12-82, encompasses not only the conductor, but also the other constituent parts of the cable used as a powerline, such as the insulation, filler and jacket.

2. If the term "powerline," as used in 30 C.F.R. § 57.12-82, encompasses the conductor, insulation, filler and jacket, then whether the regulation requires the use of additional insulation where the powerline achieves contact with waterlines, telephone lines, and air lines.

3. If the regulation requires the use of additional insulation where the powerline achieves contact with waterlines, telephone lines, and air lines, then what type of additional insulation is needed to comply with the standard?

4. Whether mandatory safety standard 30 C.F.R. § 57.12-10 is violated when the outer jacket of a telephone line achieves contact with the outer jacket of a cable used as a powerline.

B. Two basic issues are involved in the above-captioned civil penalty proceeding: (1) did a violation of the Code of Federal Regulations occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. Climax Molybdenum Company and its Climax Mine are subject to the provisions of the Federal Mine Safety and Health Act of 1977.

2. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, these proceedings.

3. At all times relevant to the above-captioned proceedings, MSHA inspector James L. Atwood was an authorized representative of the Secretary of Labor.

4. Citation No. 331733, Docket No. DENV 78-553-M was issued on July 27, 1978, by inspector James L. Atwood. A copy of that citation, together with subsequent action notices, Inspector Atwood's handwritten notes, and the Inspector's Statement, Form MSHA 7000-4, are attached hereto and incorporated herein by reference as Joint Exhibit 1.

5. On July 27, 1978, Inspector Atwood issued Citation No. 331744, Docket No. DENV 78-554-M. A copy of that citation, together with subsequent action notices, Inspector Atwood's handwritten notes, and the Inspector's Statement, Form 7000-4, are attached hereto and incorporated herein by reference as Joint Exhibit 2.

6. Citation Nos. 331733 and 331744 both involve alleged violations of regulatory standard 30 C.F.R. § 57.12-82.

7. Citation No. 331747, Docket No. DENV 78-555-M was issued by Inspector Atwood on July 28, 1978. A copy of that citation, together with subsequent action notices, Inspector Atwood's handwritten notes, and the Inspector's Statement, Form MSHA 7000-4, are attached hereto and incorporated herein by reference as Joint Exhibit 3.

8. Citation No. 331747 involves an alleged violation of 30 C.F.R. § 57.12-10.

9. The central question in the above-captioned actions is what constitutes suitable insulation or separation of powerlines from telephone lines, waterlines, or air lines.

10. Climax and MSHA agree that Inspector Atwood observed various places on the 600 Level and the Storke Level at the Climax Mine in which the outer jacket of an insulated and jacketed power cable was touching an air line, waterline or telephone line. The power conductors in these cables were carrying voltages ranging from 110 volts to 440 volts. The cables were in satisfactory condition.

11. MSHA and Climax are in agreement that each of the joint exhibits attached hereto should be admitted into evidence.

12. The Climax Mine is located at the peak of Fremont Pass in Lake County, Colorado, approximately 13 miles northeast of Leadville, Colorado, at an altitude of 11,318 feet. It is one of the world's major producers of molybdenum and the second largest underground mine in the world.

13. The Climax Mine operates 24 hours per day employing a total of approximately 3,000 employees, roughly half of whom work underground. The mine has open pit operations which employ approximately 400 workers. The mine also has crushing and milling facilities employing approximately 400 employees. The remaining employees perform various administrative functions on the surface.

14. The mine presently has two underground production levels. One level (referred to as the Storke Level) has been in production since 1952. The second underground level (the 600 Level) has been in production since 1972. Development work has begun on a third underground level which will be known as the 900 Level.

15. Open pit production began in 1974.

16. Total production at the mine is approximately 50,000 tons of ore per day.

17. Molybdenum ore is mined underground by the block caving method. A cave is created above the production areas by drilling and blasting. After the rock is fractured by blasting, creating the cave, the force of gravity causes the rock to continue to break. The rock then falls from the cave into raises (fingers) that run at a 45-degree angle into a slusher drift. Each slusher drift (also called a dash) has six finger raises. The fractured rock falls through the raise into the slusher drift. Each slusher drift has a 150-horsepower electrical motor which powers a dipper that is pulled back and forth in the slusher dash. The dipper pulls the rock towards a draw hole which is 3.9 feet wide and 8 feet long. The rock falls through the draw hole into ore trains that are sitting on tracks in a haulage drift which is located approximately 10 feet below the floor of the slusher drift. The haulage drift is perpendicular to the slusher drift. The block caving method is illustrated in Joint Exhibit 4, especially the drawings on pages 8-10. Joint Exhibit 5, "This is Climax Molybdenum," also describes the mine's operations.

18. This action involves only power cables in the drifts of the mine which have track for haulage of ore, or other materials, by rail. The Climax Mine has approximately 24 miles of haulage drifts. These drifts contain an estimated 367,000 feet of cable of the types in issue here (see paragraph 21). There are approximately 24 miles of air lines and 24 miles of waterlines in these drifts.

19. As a general rule, air lines and waterlines are on one side of the drift and power cables are on the other side of the drift.

20. All of the power cables involved in this action carry voltages having low potential (low potential is defined in 30 C.F.R. § 57.2 as 650 volts or less). In fact, none of these cables carry in excess of 440 volts.

21. The types of cables involved in this action are listed in Exhibit 6.

22. The power cables in issue in this action never carry voltages greater than the manufacturer's insulation rating for that cable.

23. These power cables may from time to time be on the same side of the drift as an air line or a waterline for a variety of reasons. These reasons include the following:

A. It is sometimes necessary to move air or waterlines or power cables from one side of the drift to the other in order to transmit air, water, or electricity to a particular location.

B. At intersections of drifts, air lines, waterlines, or power cables will frequently cross.

C. The distribution of power within production areas leads to numerous crossovers which are unavoidable. Power for slusher operations is distributed via cable referenced in paragraph 21 above. The main distribution cable is the 500 M.C.M. cable. 2/0 feeder cables are spliced into that 500 M.C.M cable to run power into a switch vault. Switch vaults are 70 feet apart in production areas on alternate sides of the haulage drift. (There are approximately 300 switch vaults in the mine. Approximately 150 are in production areas. At any given time, approximately 50 more switch vaults are active in supplying power to fans or other electrical equipment.) From the switch vault power is distributed to the motors in two slusher dashes. Slusher motors are also on alternating sides of the haulage drift, thus requiring at least one additional crossover of power cable and also frequently requiring that the power cable run parallel to the air and waterlines for several feet. These types of crossovers are illustrated in the photographs attached hereto as Joint Exhibits 7 through 14. Exhibit 7 shows a place where two drifts "Y" together. Exhibits 8, 9, and 10 illustrate the normal configuration of drifts with power cable on one side and pipelines on the other side of the drift. These exhibits also show power cable crossovers. Exhibit 11 is a closeup of cable crossing a drift running from a switch vault, across the back and up into a slusher dash. Exhibit 12 shows a switch vault on the same side of a drift as the power cable bundle, with the feeder cable out to the slusher dashes. Exhibit 13 shows another switch vault which provides power for two slusher machines; that switch vault is on the pipeline side of the drift. Exhibit 14 shows a small switch vault which supplies power to a nonproduction area.

24. The dielectric strength of air or a substance refers to the ability of air or that substance to offer a high resistance to the passage of electricity through it.

25. A powerline is a conducting material capable of carrying electrical power. A communication line (because of the low current flow) is not a poweline.

26. The court should be aware of three prior cases involving 30 C.F.R. § 57.12-82.

27. The first case is Docket No. DENV 79-92-PM, Secretary of Labor v. Kerr-McGee Nuclear Corporation. The facts in that case involved a situation in which the outer jacket of a power cable assembly was in contact with a metal pipeline. That power cable assembly consisted of conductors, each of which were surrounded by insulation having a manufacturer's rating equal to or greater than the voltage applied to the power conductors. The insulated power conductors were then surrounded by an outer jacket which was in satisfactory condition. The only thing that came in contact with the metal pipeline was the outer jacket. By motion filed May 21, 1979, MSHA moved to vacate the citation issued on those facts because there was "insufficient evidence available to support the alleged violation."

28. In a case involving similar facts, Docket No. WEST 79-252-M, MSHA v. Sunshine Mining Company, by motion served November 7, 1979, MSHA also moved to vacate a citation issued under 30 C.F.R. § 57.12-82 because "there [was] insufficient evidence to sustain the allegations contained in the citation." The facts in the Sunshine Mining case were essentially the same as those in the Kerr-McGee case.

29. In a decision dated November 29, 1979, Secretary of Labor v. Ozark Mahoning Co., Docket No. VINC 79-138-PM, Judge Stewart found a violation of 30 C.F.R. § 57.12-82. The similarity between the facts of that case and the facts of this case are uncertain since he indicates in discussing one of the citations that the "outer jacket of the cable was comprised of neoprene and rubber insulation" and on the other citation that the powerline "was protected only by factory insulation." Here each of the cables are insulated and covered with a separate heavy-duty outer jacket approved for use in mines by the Bureau of Mines.

30. Attached as Joint Exhibits 15 through 20 are various letters and interpretive memoranda issued by MSHA regarding 30 C.F.R. § 57.12-82. These constitute all of the published and unpublished interpretive letters or memoranda regarding that standard.

31. The primary purpose of this litigation is for Climax and MSHA to resolve a conflict between them regarding interpretation of the regulatory provisions in issue in this action. Climax and MSHA thus agree that in the event the court should determine that a violation(s) occurred, the appropriate civil penalty would be the amount the citation(s) was assessed for by the Office of Assessments. These amounts are as follows: Citation No. 331733--$72; Citation No. 331744--$78; and Citation No. 331747--$66.

32. Climax is a large operator within the meaning of the 1977 Mine Act.

33. Climax demonstrated good faith in attempting rapid abatement of the practices described in Citation Nos. 331733, 331744 and 331747.

B. Opinion and Findings of Fact

1. Occurrence of Violations

The principal question presented in the above-captioned cases is what constitutes suitable insulation where powerlines achieve contact with telephone lines, waterlines, or air lines. The basic facts are relatively uncomplicated. The parties, however, demonstrate considerable disagreement both as to the legal significance of the facts and as to the proper interpretation of the cited mandatory safety standards.

Citation Nos. 331733, 331744 and 331747 were issued at the Climax Mine by Federal mine inspector James L. Atwood during the course of the first inspection of that mine conducted pursuant to the provisions of the 1977 Mine Act (Tr. 203).

Citation Nos. 331733 and 331734 were issued on July 27, 1978, addressing identical practices detected by Inspector Atwood on the 600 Level and Storke Level, respectively. These citations charge Climax with violations of mandatory safety standard 30 C.F.R. § 57.12-82 in that energized powerlines of various voltages were in contact with pipelines in various places. 1/ The term "pipelines," as used in the citations, refers to both air lines and waterlines (Tr. 213), and the term "powerlines" refers to the outer jacket on insulated and jacketed cables (Tr. 223).

Citation No. 331747 was issued on July 28, 1978, addressing a practice detected by Inspector Atwood on the 600 Level. The citation charges Climax with a violation of mandatory safety standard 30 C.F.R. § 57.12-10 in that several telephone lines were observed hanging with and touching energized powerlines. The citation further alleges that the practice existed in all areas of the 600 Level. 2/ The inspector testified that he checked a total of 10 telephones and that in each instance the telephone line "came out of the phone and went right up and into a bundle of powerlines, and went down

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1/ Citation No. 331733, July 27, 1978, 30 C.F.R. § 57.12-82 states the following: "Powerlines and pipelines were in contact on the 600 level in various places. These were energized powerlines of various voltages from 110 V up." Citation No. 331744, July 27, 1978, 30 C.F.R. § 57.12-82 states the following: "Powerlines and pipelines were in contact on the Storke level in various places. These were energized powerlines of various voltages from 110V on up."

2/ Citation No. 331747, July 28, 1978, 30 C.F.R. § 57.12-10 states the following: "Several phone lines on the 600 level were observed hanging with and touching energized powerlines. This condition exists in all of the areas of the 600 level. A total of 10 phones were checked and the lines were all in contact with the powerlines."

the drift" (Tr. 218). He further testified that the telephone lines in question had jackets (Tr. 257), and that the citation addresses the outer jackets of telephone lines touching the outer jackets of power cables (Tr. 223).

At various times between August 25, 1978, and February 2, 1979, Federal mine inspectors James D. Enderby and David Park issued subsequent action notices extending the time periods for abatement. The citations were terminated in April of 1979 by Federal mine inspector Elmer E. Nichols.

The parties stipulated that molybdenum ore is mined underground at the Climax Mine by the block caving method. A cave is created above the production areas by drilling and blasting. After the rock is fractured by blasting, creating the cave, the force of gravity causes the rock to continue to break. The rock then falls from the cave into raises (fingers) that run at a 45-degree angle into a slusher drift. Each slusher drift (also called a dash) has six finger raises. The fractured rock falls through the raise into the slusher drift. Each slusher drift has a 150-horsepower electrical motor which powers a dipper that is pulled back and forth in the slusher dash. The dipper pulls the rock towards a draw hole which is 3.9 feet wide and 8 feet long. The rock falls through the draw hole into ore trains that are sitting on tracks in a haulage drift which is located approximately 10 feet below the floor of the slusher drift. The haulage drift is perpendicular to the slusher drift.

The parties further stipulated that the instant cases involve only power cables in drifts of the mine which have track for the haulage of ore, or other materials, by rail. The Climax Mine has appoximately 24 miles of haulage drifts, and these drifts contain an estimated 367,000 feet of cable of the types in issue here. The types of cables involved in these proceedings are listed on Joint Exhibit 6. There are approximately 24 miles of air lines and 24 miles of waterlines in these drifts.

All of the power cables involved in the instant cases carry voltages having low potential, as that term is defined by 30 C.F.R. § 57.2, i.e., 650 volts or less. None of these cables carry in excess of 440 volts. Additionally, the cables never carry voltages greater than the manufacturer's insulation rating.

As a general rule, air lines and waterlines are on one side of the drift and power cables are on the other side of the drift. However, the power cables may, from time to time, be on the same side of the drift as an air line or a waterline for a variety of reasons. These reasons include the following: First, it is sometimes necessary to move air or waterlines or power cables from one side of the drift to the other in order to transmit air, water, or electricity to a particular location. Second, at intersections of drifts, air lines, waterlines, or power cables will frequently cross. Third, the distribution of power within production areas leads to numerous crossovers which are unavoidable. Power for slusher operations is distributed via cable referenced in Joint Exhibit 6. The main distribution cable is the 500 M.C.M.

cable. 2/0 feeder cables are spliced into that 500 M.C.M. cable to run power into a switch vault. Switch vaults are 70 feet apart in production areas on alternate sides of the haulage drift. There are approximately 300 switch vaults in the mine. Approximately 150 are in production areas. At any given time, approximately 50 more switch vaults are active in supplying power to fans or other electrical equipment. Power is distributed from the switch vault to the motors in two slusher dashes. Slusher motors are also on alternating sides of the haulage drift, thus requiring at least one additional crossover of power cable and also frequently requiring that the power cable run parallel to the air and waterlines for several feet.

In addition to the foregoing, the parties stipulated that when the respective citations were issued, Inspector Atwood observed various places on the 600 Level and the Storke Level at the Climax Mine in which the outer jacket of an insulated and jacketed power cable was touching an air line, waterline or telephone line, and that the power conductors in these cables were carrying voltages ranging from 110 volts to 440 volts. Furthermore, the parties stipulated that the cables were in satisfactory condition.

Mandatory safety standard 30 C.F.R. § 57.12-82 provides as follows: "Powerlines shall be well separated or insulated from waterlines, telephone lines, and air lines." The regulation applies "only to the underground operations of underground mines." 30 C.F.R. § 57.1. The principal area of disagreement between the parties centers around the appropriate definition of the term "powerlines" and the determination as to what constitutes suitable insulation at the points where powerlines achieve contact with waterlines, air lines, and telephone lines.

Climax argues that the term "powerline" should be defined as a "conducting material capable of carrying electrical power;" i.e., that the definition of powerline should be limited to the copper conductors contained within a power cable, and exclude the insulation, jacket and filler. Climax further argues that when this definition is applied, one can then consult both the American Society for Testing and Materials (ASTM) standards for the manufacture of power cable and accepted principles of electrical engineering to determine whether the insulation is sufficient. In Climax's view, unless such definition is adopted, no objective basis exists for determining what constitutes suitable insulation. Additionally, Climax maintains that its interpretation is consistent with the electrical standards in 30 C.F.R. § 57.12. (Climax's Posthearing Brief, pp. 8-15, 20).

MSHA categorically rejects Climax's contentions and argues that "powerline" includes not only the metal that actually conducts the flow of power from one point to another, but also the component parts that make up the line from one point to another, i.e., the insulation, jacket and filler. (MSHA's Posthearing Brief, p. 3). For the reasons set forth below, I conclude that the term "powerline," as used in 30 C.F.R. § 57.12-82, encompasses not only the conductor, but also all constituent parts of the cable that make up the line from one point to another, e.g., the insulation, jacket and filler. 3/

Neither Climax's nor MSHA's witnesses were able to point to a learned treatise in the field of electrical matters containing a definition of the term "powerline," and none of the exhibits suggest an express definition for the term. Accordingly, on the basis of the record developed in these cases, it must be concluded that the term "powerline," as used in the general electrical field, is not susceptible to a precise definition of the type that would be of meaningful assistance in deciding the issues presented in the instant cases. It is therefore necessary to consider all electrical standards and definitions contained in Part 57 of Title 30 of the Code of Federal Regulations in order to determine the meaning of the term "powerline" as used in the context of standards designed to secure a safe work place for miners working in the underground areas of metal and nonmetallic mines.

A full review of the electrical standards and definitions set forth in Part 57 of Title 30 of the Code of Federal Regulations convinces me that Climax's definition of the term "powerline" is inaccurate when viewed in the context of mine safety as relates to electrical applications located in the underground areas of underground metal and nonmetallic mines. The electrical terms appearing most frequently in 30 C.F.R. § 57.12, insofar as material to the instant cases, are "cables," trailing cables," "power cables," "conductors," "power conductors," "bare power conductors," "electrical conductors," "power wires," "signal wire," "bare signal wires," "trolley feeder wires," "trolley wires," "powerlines" and "bare powerlines." Of these, only the term "conductor" is expressly defined within Part 57 of Title 30. Climax's proffered definition of "powerline" is identical in all material respects to the definition of "conductor" set forth at 30 C.F.R. § 57.2, which provides as follows: "'conductor' means a material, usually in the form of a wire, cable, or bus bar, capable of carrying an electric current." It can therefore be deduced that if the drafters of the subject regulation had intended it to require only "conducting material capable of carrying electrical power" to be "well separated or insulated from waterlines, telephone lines, and air lines," then they would have used the term "conductors" in lieu of the term "powerlines." Substantial guidance is also provided by a comparison of mandatory safety standards 30 C.F.R. § 57.12-66 and 30 C.F.R. § 57.12-82. The former

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3/ Climax maintains that MSHA stipulated to this definition of a powerline and that MSHA should not be permitted to depart from the definition as stipulated (Climax's Posthearing Brief, pp 14-15). The stipulation in question states as follows: "A powerline is a conducting material capable of carrying electrical power. A communication line (because of the low current flow) is not a powerline." Having considered both the comments of counsel for MSHA (Tr. 117-118, 122-123) and the precise wording of the stipulation, I conclude that the sole purpose of this stipulation was to set forth a distinction as to the different functions performed by powerlines and communication lines. Accordingly, the conclusion reached in this decision as relates to the definition of "powerline" does not do violence to the stipulation.

regulation, applicable "only to the surface operations of underground mines," 30 C.F.R. § 57.1, makes express reference to "bare powerlines" (emphasis added). The latter regulation, applicable only to the underground operations of underground mines, refers to "powerlines" and does not contain the modifying adjective "bare." In view of the foregoing, it is apparent that the drafters of Part 57 of Title 30 intended that the term "powerline," in the context of 30 C.F.R. § 57.12-82, envisioned a line that already included a conductor or conductors with the insulation and jacket as manufactured, such as exists in Exhibit O-4. Accordingly, I conclude that the term "powerline," as used in 30 C.F.R. § 57.12-82, encompasses not only the metal that actually conducts the flow of electricity from one point to another, but also all component parts that make up the line from one point to another. The electrical cables at issue in Citation Nos. 331733 and 331744 were "powerlines" within the meaning of the cited regulation. Furthermore, the terms "trolley wires" and "bare power conductor," as treated in 30 C.F.R. § 57.12-80, bolster the proposition that the term "powerlines" in the context of 30 C.F.R. § 57.12-82 envisioned something more than bare power conductors.

The second area of controversy concerns the determination as to what constitutes insulation in compliance with the regulation. Both MSHA and Climax agree that the purpose of 30 C.F.R. § 57.12-82 is to prevent a waterline, telephone line or air line from becoming energized (Climax's Posthearing Brief, p. 19; MSHA's Posthearing Brief, p. 4). Climax argues that compliance with the standard is achieved if the manufacturer applied insulation on the powerline is sufficient to achieve the standard's objective. Accordingly, Climax argues that the cables at issue (Joint Exh. 6) provide the requisite protection by their design (Climax's Posthearing Brief).

MSHA argues that, in the context of mining, avoidable hazards and risks are required to be eliminated to the greatest extent possible, and that this objective is attained when the powerlines are well separated from the waterlines, telephone lines and air lines, or when insulation, in addition to that which is placed on the powerline by the manufacturer, is used at the points of contact. In MSHA's view, Climax's proffered interpretation is both shortsighted and naive because it incorrectly assumes that powerlines used in the underground areas of metal and nonmetallic mines will never sustain damage. According to MSHA, Climax's approach allows avoidable hazardous conditions to remain in the miner's work environment, and places excessive faith in the initial construction and manufacturer's testing of every inch, foot and mile of powerline used in the Climax Mine. MSHA points to the Nelson/Shepich Memorandum of February 21, 1975 (Joint Exh. 18) as a detailed statement of its interpretation of the requirements of the regulation, and argues that the interpretation set forth in the memorandum should be accorded deference, citing Bell v. Brown, 557 F.2d 849, 855 (D.C. Cir. 1977); Perine v. William Norton & Company, Inc., 509 F.2d 114, 120 (2d Cir. 1974); S. Rep. No. 95-181, 95th Cong., 1st Sess. (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT of 1977 at 637 (1978) (MSHA's Posthearing Brief, pp. 2-7).

It is unnecessary to rely upon the Nelson/Shepich Memorandum of February 21, 1975 (Joint Exh. 18) for the proposition that mandatory safety standard 30 C.F.R. § 57.12-82 requires the use of additional insulation at the points where powerlines contact waterlines, telephone lines and air lines. The regulation, when interpreted in accordance with the principles of statutory construction, requires the use of additional insulation.

As a general proposition, the rules of statutory construction can be employed in the interpretation of administrative regulations. See C. D. Sands, 1A Sutherland Statutory Construction, § 31.06, p. 362 (1972). According to 2 Am. Jur.2d, Administrative Law, § 307 (1962), "rules made in the exercise of a power delegated by statute should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason." Remedial legislation directed toward securing safe work places must be interpreted in light of the express Congressional purpose of providing a safe work environment, and the regulations promulgated pursuant to such legislation must be construed to effectuate Congress' goal of accident prevention. Brennen v. Occupational Safety and Health Review Commission, 491 F.2d 1340 (2d Cir. 1974).

Mandatory safety standard 30 C.F.R. § 57.12-82 uses the terms "powerlines" and "insulated." As noted previously in this decision, it is apparent that the drafters of Part 57 of Title 30 intended that the term "powerline," in the context of 30 C.F.R. § 57.12-82, envisioned a line that already included a conductor or conductors with the insulation and jacket as manufactured, such as exists in Exhibit O-4. Accordingly, the use of the term "insulated" in 30 C.F.R. § 57.12-82 would be a redundancy if it did not require the use of additional insulation. It is a time-honored rule of statutory construction that effect must be given, if possible, to every word, clause and sentence contained in a statute. "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." C. D. Sands, 2A Sutherland Statutory Construction, § 46.06, p. 63 (1973). However, it is equally "clear that if the literal import of the text of an act is not consistent with the legislative meaning or intent, or such interpretation leads to absurd results, the words of the statute will be modified by the intention of the legislature." C. D. Sands, 2A Sutherland Statutory Construction, § 46.07, p. 65 (1973).

The foregoing interpretation of 30 C.F.R. § 57.12-82 as requiring additional insulation where powerlines achieve contact with waterlines, telephone lines and air lines, gives effect to both words contained in the regulation, preserves the intent of the drafters, and harmonizes with Congress' goal of accident prevention. It cannot be said that the drafters were unaware of the significance attached to the use of the term "insulated," because such term is defined by 30 C.F.R. § 57.2 as follows:

> "Insulated" means separated from other conducting surfaces by a dielectric substance permanently offering a high resistance to the passage of current and to disruptive discharge through the substance. When any substance is said to

> be insulated, it is understood to be insulated in a manner suitable for the conditions to which it is subjected. Otherwise, it is, within the purpose of this definition, uninsulated. Insulating covering is one means for making the conductor insulated.

It is significant to note that "[w]hen any substance is said to be insulated, it is understood to be insulated in a manner suitable for the conditions to which it is subjected." Climax's position in this case fails to take this requirement into account.

Climax's principal argument asserts that the electrical cables used as powerlines in the underground areas of the Climax Mine accord the requisite protection that the regulation seeks to secure by virtue of their very design. The testimony of Dr. Fred Leffler, Associate Professor of Electrical Engineering at the Colorado School of Mines, supports Climax's contention that the cables, manufactured in accordance with the ASTM standards, are substantially overdesigned in terms of their dielectric properties.

According to Dr. Leffler, the dielectric strength of ethylene-propylene rubber (EPR) is approximately 350 volts per mil, i.e., approximately 350 volts per 1/1000 of an inch (Tr. 363, 396). EPR is the type of insulation used on much of the cable at issue in the instant cases. These 600-volt rated, EPR-insulated cables have an insulation thickness ranging from 30 to 60 mils, depending on the size of the conductors (Exh. 0-7, Table 1D). The size of the conductors in the cables at issue ranges from 16 Awg to 500 mcm (Joint Exh. 6). Accordingly, these cables have insulation around the conductors with a dielectric strength rating, depending on the size of the conductors, of 10,500 volts (Awg sizes 14 to 9), 15,750 volts (Awg sizes 8 to 2), 19,250 volts (Awg sizes 1 to 4/0), and 22,750 volts (225-500 mcm). (See, Exh. 0-7, table 1D, and Tr. 361-364.)

Styrene butadiene rubber (SBR), the other type of insulation used on the power cables at issue in these proceedings, has a dieletric strength rating of approximately 250 volts per mil (Tr. 357-358). Accordingly, the 600-volt rated, SBR-insulated cables have insulation around the conductors with a dielectric strength rating, depending upon the size of the conductors, of 7,500 volts (Awg sizes 18-16), 11,250 volts (Awg sizes 14-9), 15,000 volts (Awg sizes 8-2), 20,000 volts (Awg sizes 1 to 4/0), and 23,750 volts (225 to 500 mcm). (See, Exh. 0-7, table 1A, and Tr. 357-361.)

The neoprene rubber used as a jacket is not taken into account when determining the insulation rating. The jacket serves to protect the insulation from outside forces such as oils, acids, alkalies, water or moisture, flame and abrasion (Tr. 48, 67-68, 365). However, both Dr. Leffler and Lawrence P. Filek, an MSHA electrical engineer, agreed that the jacket has an insulating capability (Tr. 49, 367). According to Dr. Leffler, neoprene and lead-cured neoprene have a dielectric strength of approximately 300 volts per mil (Tr. 367). Cable specifications set forth by Climax's cable supplier, Anixter Brother's Inc., indicate that the jacket on a three-conductor, 16-Awg cable, which appears to be the smallest cable listed on Joint Exhibit 6, is 4/64's of an inch (Exh. 0-5); *i.e.*, 62.5 mils. Accordingly, the jacket on what appears to be the smallest cable would provide an extra 18,750 volts of dielectric substance on that cable.

The fact that the cables possess these qualities is not dispositive. It must be borne in mind that the powerline applications addressed by 30 C.F.R. § 57.12-82 are located in the underground areas of metal and nonmetallic mines, an extremely harsh environment. The cables can sustain physical damage from a variety of sources such as fly rock and concussion from blasting, rubbing by haulage equipment, and dragging over sharp rock or metal edges (Tr. 71, 73-74, 198-200, 215, 295, 329). According to Mr. Filek, if wires or small metal objects, propelled by a blast concussion, penetrated both the jacket and insulation, a waterline or air line could become energized in the absence of added insulation if the cable was within sufficient proximity to the waterline or air line. This could occur even though the cable did not contact the pipe at the point of penetration. Electricity can conduct along the surface of a contaminated cable to the point of contact (Tr. 75-76). Furthermore, it it should be borne in mind that Inspector Atwood worked as a miner at the Climax Mine from 1956 to 1972 (Tr. 195-196). His testimony is deemed particularly probative as relates to both the conditions existing in the mine and the frequency of employee contact with the waterlines and air lines. His testimony reveals that the mine is wet and that individuals walking through underground areas are walking in mud and water most of the time. It is extremely wet when the snow melts in spring. In fact, the mine resembles an underground lake in areas at that time of the year (Tr. 211). The inspector further testified that it is normal for miners to achieve physical contact with the waterlines and air lines during their normal working day. Physical contact can occur while hooking up air and water hoses, while climbing ladders or while stepping into the dashes (Tr. 214).

Additionally, it is significant to note that both Mr. Williams and Mr. Pupera testified that they would prefer added insulation at the point of contact prior to touching the water or air lines, provided the jacket and insulation had been penetrated (Tr. 315-316, 329-330).

It cannot be said that drafters of Part 57 of Title 30, in formulating their definition of "insulated," were unaware of either the harsh environment in the underground areas of metal and nonmetallic mines or the dielectric properties of jackets and insulation used on cables approved for use in mines. A substance is "insulated" when it is "insulated in a manner suitable for the conditions to which it is subjected," a requirement directly related to the mining environment. The fact that "[i]nsulating covering is one means for making the conductor insulated" shows that the drafters did not intend to rely solely upon the cable as manufactured in all cases.

These considerations, when applied to 30 C.F.R. § 57.12-82, point to an interpretation requiring the use of insulation in addition to that which is on the powerline. Given the harsh environment existing in the underground areas of metal and nonmetallic mines, it would be unreasonable to rely solely upon the manufacturer-applied insulation to achieve the regulation's stated goal. In this environment, a mine operator cannot be 100 percent certain that every inch of powerline will retain its dielectric integrity throughout each hour and minute of the day. The added insulation may not be foolproof, but its use promotes the regulation's objective and thereby contributes to securing a safe work place for miners. "Should a conflict develop between a statutory interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise of safety, the first should be preferred." District 6, UMWA v. Department of Interior Board of Mine Operations Appeals, 562 F.2d 1260 (D.C. Cir. 1972). Accordingly, I conclude that 30 C.F.R. § 57.12-82 requires the use of additional insulation where powerlines contact waterlines, telephone lines and air lines.

The final question presented as relates to Citation Nos. 331733 and 331744 concerns the type of additional insulation necessary to comply with the regulation. It is unnecessary to explore this issue in order to determine whether the cited practices constituted violations of 30 C.F.R. § 57.12-82 because the mine operator in this instance had no additional insulation at the points of contact with the air lines and waterlines. The absence of any additional insulation established violations of the regulation. However, the evidence does disclose the type of additional insulation necessary, at a minimum, to comply with the requirement, as set forth in the following paragraphs.

One of MSHA's interpretations is set forth in the last paragraph of the Nelson/Shepich Memorandum of February 21, 1975 (Joint Exh. 18), as follows: "Additional insulation means that insulation in addition to the jacketing shall have a dielectric strength at least equal to the maximum applied voltage on the conductor." This interpretation is entitled to weight. As noted by the Commission in The Helen Mining Company, 1 FMSHRC 1796, 1801, 1979 OSHD par. 24,045 (1979):

> In accordance with this expression of congressional intent, we will accord special weight to the Secretary's view of the 1977 [Mine] Act and the standards and regulations he adopts under them. His views will not be treated like those of any other party, but will be treated with extra attention and respect * * *. [T]his weight may vary with the question before the Commission, especially where the Secretary has gained some special practical knowledge or experience through his inspection, investigation, prosecution, or standards-making activities * * *.

The record offers no clear indication as to how the drafter of the memorandum reached the conclusion that the additional insulation "shall have a dielectric strength at least equal to the maximum applied voltage on the conductor." However, the record clearly shows that the wording in that paragraph of the memorandum does not set forth a logical interpretation as to the amount of additional insulation needed, as demonstrated by the testimony of two of MSHA's witnesses, Mr. Lawrence T. Filek and Mr. William S. Vilcheck.

Mr. Filek received a Bachelor of Science degree from the University of Illinois in 1951, and thereafter practiced his profession in both Government and the private sector. At the time of the hearing, he was in his fifth year of employment at MSHA's Denver Technical Support Center in Lakewood, Colorado. During cross-examination, he testified as follows:

> Q. Now, would it be a fair summary of this memorandum to say that what the Shepich-Nelson memorandum requires is that there be some insulation in addition to the jacketing on the power line?
>
> A. Yes.
>
> Q. And that that amount of insulation be, looking to the last sentence, at least equal to the maximum voltage applied on the conductor?
>
> A. What is implied there is that the dielectric strength of the insulation should be at least equal to the insulation -- the dielectric strength of the conductor, and not the applied voltage.
>
> Q. Well, let me rephrase the question. I think what the memorandum requires is that the additional insulation beyond the outer jacketing have a dielectric strength at least equal to the maximum voltage which would be applied to the power conductor; isn't that correct?
>
> A. I don't think so.
>
> Q. Oh? Well, could you restate for me then what you do believe it says?
>
> A. Well, I could restate for you what I believe it should say.
>
> Q. Well, I'm interested in what it says, Mr. Filek, not what you wish it said.
>
> A. Okay. This memorandum equates -- this memorandum equates dielectric strength, which is usually measured in volts per thickness of insulation to voltage, and the units do not -- do not correspond; therefore, it cannot be an equality.

(Tr. 113-114).

Mr. Vilcheck received a Bachelor of Science degree in electrical engineering and a Master of Science degree in electrical engineering in 1973 and 1975, respectively. Both degrees were received from West Virginia

University. He received an emphasis on power systems during his studies for his Master's of Science Degree, and, at the time of the hearing, was in his second year of employment at MSHA's Pittsburgh Technical Support Center. Mr. Vilcheck testified as follows during cross-examination:

> Q. Does Joint Exhibit 18 say you should double it? What does that Joint Exhibit 18 say should be doubled? That is, is it the voltage applied to the conductor, or is it the manufacturer's rating on the insulation?
>
> A. Okay. Exhibit 18 to me says that -- it says, "Insulation in addition to the jacketing shall have a dielectric strength at least equal to the maximum voltage on the conductor."
>
> Larry says we are kind of comparing apples to oranges. I think it results from a nontechnical person writing this memorandum. Okay?
>
> You know, we can argue what his intent was or how we interpret it to be, but actually what he has verbatim I don't think makes a whole lot of sense. Okay? We know that he's trying to put additional insulation on the conductor, and I think what he means is at least equal to that of the insulation on the conductor, but I --
>
> Q. But that's not what it says.
>
> A. What it says may be -- I'm not sure what it says is what his intent was either. Okay?

(Tr. 170).

The testimony of Mr. Filek reveals that the additional insulation will meet the requirements of 30 C.F.R. § 57.12-82 if it possesses the following traits: A piece of permanently fastened, nonabsorbent insulator should be placed between the cable and the waterline, telephone line, or air line (Tr. 107). The added insulation should have a dielectric rating at least equal to the dielectric rating of the cable when it was new (Tr. 110).

This is not to say, of course, that other methods of insulation cannot be employed. The only conclusion that can be drawn from the record is that added insulation with the foregoing characteristics is, at a minimum, sufficient to comply with 30 C.F.R. § 57.12-82.

In view of the foregoing, and particularly because in these instances no additional insulation whatsoever was applied, it is found that the practices set forth in Citation Nos. 331733 and 331744 were violations of 30 C.F.R. § 57.12-82. The applications for review will be denied in Docket Nos. DENV 78-553-M and DENV 78-554-M, and a civil penalty will be assessed for these violations in Docket No. WEST 79-340-M.

As noted previously in this decision, Citation No. 331747 alleges a violation of mandatory safety standard 30 C.F.R. § 57.12-10 in that several telephone lines were observed hanging with and touching energized powerlines. The cited mandatory safety standard provides as follows: "Telephone and low-potential signal wire shall be protected, by isolation or suitable insulation, or both, from contacting energized power conductors or any other power source."

The inspector's testimony reveals that the citation charges a violation of that portion of the regulation requiring telephone and low-potential signal wire to be protected, by isolation and/or suitable insulation, from contacting energized power conductors (see, e.g., Tr. 219, 251, 258). The phrase "or any other power source," as used in the regulation, refers to electrical switchboxes and items of a similar nature, but does not refer to a line (Tr. 258).

As noted previously in this decision, the inspector testified that the telephone lines in question had jackets, and that the citation addresses the outer jackets of telephone lines touching the outer jackets of power cables. It is therefore clear that the telephone lines were not in contact with "power conductors" in view of the definition of "conductor" set forth at 30 C.F.R. § 57.2.

Accordingly, the application for review will be granted in Docket No. DENV 78-555-M, and the proposal for a penalty in Docket No. WEST 79-340-M will be dismissed as relates to Citation No. 331747.

2. Evaluation of Civil Penalty Assessment Criteria

The parties stipulated that the primary purpose of this litigation is to permit Climax and MSHA to resolve a conflict between them regarding the interpretation of the regulations at issue. The parties further stipulated that if violations are found to have occurred, then the civil penalties assessed by the Office of Assessments would be appropriate. The relevant proposed assessments are identified as follows:

Citation No.	Date	30 C.F.R. Standard	Assessment
331733	7/27/78	57.12-82	$ 72
331744	7/27/78	57.12-82	78
		Total:	$150

The record fully supports the assessment of civil penalties in the amounts proposed by the Office of Assessments. The absence of operator negligence is deemed of particular significance to this determination.

The record reveals that Climax is a large operator, producing approximately 50,000 tons of ore per day; that Climax has no history of previous violations for which assessments have been paid during the period of time prior to July 27, 1978 (Tr. 22-23); and that Climax demonstrated good faith in attempting rapid abatement (Tr. 21-22, 202-203, 213). No evidence was presented establishing that the assessment of civil penalties will affect Climax's ability to remain in business, and, accordingly, it is found that the assessment of civil penalties for Citation Nos. 331733 and 331744 will not affect Climax's ability to remain in business. Hall Coal Company, 1 IBMA 175, 79 I.D. 688, 1971-1973 OSHD par. 15,380 (1972).

The air lines and waterlines in the Climax Mine are grounded to the rails of the haulage tracks at 500-foot intervals (Tr. 320), and are supported at 6- to 10-foot intervals on supports attached to rock bolts driven into the rock (Tr. 339). The rock at the Climax Mine makes a very good grounding medium (Tr. 339). Furthermore, the cables at issue in these proceedings were in satisfactory condition. Based upon these considerations, the design characteristics of the cables at issue in these proceedings and the voltages applied to the cables, Climax could have had some foundation for concluding that additional insulation was not necessary at the points where powerlines contacted waterlines, telephone lines and air lines because it could have concluded in good faith, although erroneously, that the objective of the regulation had been met. Accordingly, it is found that Climax did not demonstrate negligence in connection with the practices described in the citations.

The best available evidence indicates that no injuries have been sustained at the Climax Mine as a result of powerlines energizing waterlines, telephone lines or air lines (Tr. 297-298). In fact, Mr. Pupera, the electrical superintendent, had never heard of the AC system energizing a waterline or an air line at the Climax Mine, although he had heard of it occurring from other causes. He related approximately two or three occurrences over an 8-year period in which the trolley wire was knocked down and achieved contact with a pipe. In view of these considerations, the characteristics of the jacketed and insulated cables at issue in these proceedings, and the specific electrical applications encompassed by the citations, it is found that the occurrence of the event against which the standard is directed was improbable. However, if the event did occurr, then all miners achieving proper conductive contact with the waterlines or air lines would be exposed to serious or fatal injury (see, e.g., Tr. 213). Accordingly, it is found that the violations were moderately serious.

In view of the foregoing, Climax will be assessed civil penalties as set forth above.

VI. Petitioner's Motion in Docket No. WEST 79-340-M to Withdraw the Proposal for a Penalty as Relates to Certain Citations

MSHA filed a written motion during the hearing on March 11, 1980, to withdraw the proposal for a penalty as relates to six citations. The motion states, in part, as follows:

> 1. From August 7, 1978, to December 27, 1978, the following citations were issued to respondent:

(a) No. 333300 for an alleged violation of 30 C.F.R. § 57.12-10;

(b) No. 333331 for an alleged violation of 30 C.F.R §57.12-1;

(c) No. 333242 for an alleged violation of 30 C.F.R. § 57.12-25;

(d) No. 333246 for an alleged violation of 30 C.F.R. § 57.12-13;

(e) No. 333335 for an alleged violation of 30 C.F.R. § 57.12-13;

(f) No. 333336 for an alleged violation of 30 C.F.R. § 57.12-13.

2. On July 25, 1979, the Federal Mine Safety and Health Administration, Office of Assessments, assessed proposed penalties for each of the alleged violations set forth in the aforesaid citations, in the following amounts:

Citation No.	Assessed Proposed Penalty
333300	$255.00
333331	$325.00
333242	$ 56.00
333246	$325.00
333335	$325.00
333336	$325.00

3. There is insufficient evidence to establish a violation of the aforesaid mandatory standards as the only witness who can testify to the conditions of the alleged violations is permanently unavailable to testify at the hearing.

In view of the representations set forth above, an order will be entered granting MSHA's motion.

VII. Conclusions of Law

1. Climax Molybdenum Company and its Climax Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to these proceedings.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, these proceedings.

3. Federal mine inspector James Atwood was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of Citation Nos. 331733, 331744 and 331747.

4. The practices set forth in Citation Nos. 331733, and 331744 were in violation of mandatory safety standard 30 C.F.R. § 57.12-82.

5. The practice described in Citation No. 331747 was not a violation of mandatory safety standard 30 C.F.R. § 57.12-10.

6. All of the conclusions of law set forth previously in this decision are reaffirmed and incorporated herein.

VIII. Proposed Findings of Fact and Conclusions of Law

All briefs filed in these proceedings, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in these cases.

ORDER

IT IS ORDERED that the February 25, 1980, determination in Docket No. WEST 79-340-M granting MSHA's motion to withdraw the proposal for a penalty as relates to Citation Nos. 333241, 333339 and 333340 be, and hereby is AFFIRMED.

IT IS FURTHER ORDERED that MSHA's March 11, 1980, motion to withdraw the proposal for a penalty in Docket No. WEST 79-340-M as relates to Citation Nos. 333300, 333331, 333242, 333246, 333335 and 333336 be, and hereby is GRANTED.

IT IS FURTHER ORDERED that the applications for review in Docket Nos. DENV 78-553-M and DENV 78-554-M be, and hereby are, DENIED, and that such application for review proceedings be, and hereby are, DISMISSED.

IT IS FURTHER ORDERED that the application for review in Docket No. DENV 78-555-M be, and hereby is, GRANTED, and that Citation No. 331747 be, and hereby is VACATED. The proposal for a penalty in Docket No. WEST 79-340-M is herewith DISMISSED as relates to such Citation.

IT IS FURTHER ORDERED that Climax be, and hereby is, ASSESSED civil penalties in the amount of $150, as set forth in Part V(B)(2), *supra*, and that Climax pay such civil penalties within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

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Administrator for Coal Mine Safety and Health, U.S. Department of Labor

Standard Distribution

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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DEC 18 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	Civil Penalty Proceeding Docket No. LAKE 80-192-M A.C. No. 33-03760-05001
v.	
MAUMEE HAULERS AND EXCAVATORS, Respondent	Dorr Street Pit Mine

DECISION

Appearances: Marcella L. Thompson, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner;
Robert H. Parker, Vice President, Maumee Haulers and Excavators, Swanton, Ohio, for Respondent.

Before: Judge Lasher

This proceeding arises under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Toledo, Ohio, on August 19, 1980. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proferred during closing argument, I entered an opinion on the record. 1/ My bench decision containing findings, conclusions, and rationale appears below as it appears in the transcript, other than for minor corrections of grammar and punctuation and the excision of *obiter dicta*:

> This proceeding arises upon the filing of a petition for assessment of penalty by the Secretary of Labor on March 28, 1980, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a).
>
> The Secretary seeks penalties against Respondent for the commission of two violations cited in Citation Nos. 368929 and 368930, which were issued on July 18, 1979. Citation No. 368929 alleges an infraction of 30 C.F.R. § 56.9-11

1/ Tr. 104-112.

and Citation No. 368930 alleges an infraction of 30 C.F.R. § 56.11-2. These two citations involved the same Insley crane, which was observed on July 18, 1979, in the Respondent's Dorr Street Pit and was seen by the inspector to have the following allegedly violative conditions present: First, that the window in the side door of the crane was cracked and broken; and, second, that a handrail was not provided on the elevated walkway on the crane.

The Respondent, in its response to my prehearing order, indicated two critical issues, one of which I find is ultimately dispositive of this case. The first issue raised by Respondent is that the crane in question was normally operated by a part-owner of the corporation, not an employee. The second issue was that the machine in question (the crane) was out of service and was not in use at the time the inspector cited the allegedly violative conditions. The Respondent admits that the two violations alleged, that is, the window violation and the handrail violations, did exist. Accordingly, I preliminarily conclude that the conditions described in the two subject citations did exist. This, of course, in view of the questions raised by Respondent, does not, in and of itself, constitute a finding that a violation of the Act did in fact occur.

Also preliminarily, I note that the record clearly indicates that the Respondent had no history of previous violations, and in this connection I further note that the two citaions were issued upon the first inspection of the sand pit in question. In addition, I preliminarily find, based upon the stipulation of the parties, that any penalty which I might assess in this case, up to the proposed initial assessment of MSHA, would not affect the Respondent's ability to continue in business. The parties also indicated that the Respondent is a small operator, so there is no (conflict) with respect to that traditional penalty assessment factor. In view of my subsequent finding, I find it unnecessary to evaluate the evidence with respect to negligence and gravity.

The Respondent, in closing argument, reiterated the two questions which had been raised previously in its prehearing submission. The second such issue being that since the cited machine was operated only by the owners of the corporation and not by employees, the jurisdiction of the Secretary, and I would presume the jurisdiction of the Federal Mine Safety and Health Review Commission, would not attach. I find no merit to this contention. The law is relatively clear and settled on the point that a family-owned and family-operated business does come within the (coverage of the) Act. Also, the intent of Congress in enacting this protective legislation extends to any person, not just miners or employees of these kinds of companies. Accordingly, I find that the Respondent does come within the coverage of the Act, is subject to regulation by MSHA under the Act, and that this entire proceeding is subject to the review function of the Federal Mine Safety and Health Review Commission. See Marshall v. Kraynak, 604 F.2d 231 (3rd Cir. 1979). The fact that the three Parker brothers actually own and engage in some of the work of the mine in question is no bar to their inclusion within the jurisdiction of the Act and I further find that they are miners the same as are their employees. 30 U.S.C. § 820(d)(g) provides that a "miner" means "any individual working in a coal or other mine." See Marshall v. Sink, 614 F.2d 37 (4th Cir. 1980).

In its closing argument the Respondent also contended that the two citations were improperly issued based upon the following (stated) logic: "We feel that a machine that is visually out of service should not be subject to the issuance of a citation," or words to that effect. I do find merit in this last contention. The evidence indicates that on July 18, 1979, the inspector, Michael J. Pappas, observed the Insley crane in the pit. Even though there were no tags on this piece of equipment indicating that it was not to be used, the inspector knew the engine was out of service. The investigation by MSHA, both at the time and subsequently, was not such as to indicate that the crane was being operated in the allegedly violative condition described in the two citations. Nor was there any investigation which would indicate that the crane had ever operated in that condition. There is no evidence from employees of the Respondent which indicate that the machine, either before July 18, 1979, or after July 18, 1979, operated in the condition described in the two citations. The inspector was unable to testify that he had ever seen the crane in operation at all.

The president of Respondent, Mr. Ike Parker, testified that he had purchased the subject crane some 3 or 4 months earlier, that is, prior to July 18, 1979, and that it had been broken down and out of repair most of the time in between, and that on July 18, 1979, a new crane was on the premises and being operated by his brother, Conrad Parker. Ike Parker also indicated that he was negotiating with Columbus Equipment Company regarding the purchase of this new Insley crane and that in order to obtain a better trade-in price for the old crane, which was the subject of the two citations, he was attempting to -- and here I paraphrase -- improve the performance of the engine. Ike Parker indicated that the whole back end of the old crane was out. Inferring from his testimony, I find it was in an obvious state of condition to indicate to anyone that it was not in operating condition.

Section 102(b)(3)(h)(1) of the Act (provides) that a "coal or other mine," can include equipment and machines. It also indicates that for such equipment or machines to be a mine that they, insofar as applicable here, must be "used in, or (are) to be used" in the work of extracting minerals from their natural deposits." The evidence in this record clearly indicates that the machine was out of service at the time the inspector issued the citations. Thus, I find that the equipment in question was not within the definition so as to be subject to the issuance of citations and withdrawal orders. Therefore, I find that the position of Respondent in this case is meritorious and that the two citations in question were improperly issued. 2/ Accordingly, it is ordered as follows: Citation Nos. 368929 and 368930, issued July 18, 1979, are vacated, and this proceeding is dismissed.

Michael A. Lasher, Jr., Judge

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2/ See Plateau Mining Company, 2 IBMA 303 (1973).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

DEC 18 1980

SECRETARY OF LABOR, MINE SAFETY AND
HEALTH ADMINISTRATION (MSHA),
Petitioner,

v.

MAUDLIN CONSTRUCTION COMPANY,
Respondent.

CIVIL PENALTY PROCEEDINGS

DOCKET CENT 80-114-M
A/O NO. 13-01910-05001
DOCKET CENT 80-121-M
A/O NO. 13-01160-05001
DOCKET CENT 80-141-M
A/O NO. 13-01848-05001
DOCKET CENT 80-142-M
A/O NO. 13-01349-05001
(Consolidated)
DOCKET CENT 80-201-M
A/O NO. 13-01349-05002
DOCKET CENT 80-30-M
A/O NO. 13-01802-05001

Mines: Clay County or Stellish Pit,
Solberg Pit, Clark Pit,
Mortvedt Pit and Nelson Pit

DECISION

APPEARANCES:

Eliehue C. Brunson, Esq., Office of the Solicitor
United States Department of Labor, 911 Walnut Street, Room 2106
Kansas City, Missouri 64106
for the Petitioner,

Stewart H. M. Lund, Esq.,
P O Box 634, Webster City, Iowa 50595

for the Respondent.

Before: Judge Virgil E. Vail

I. Procedural Background

The above-captioned civil penalty proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a) [hereinafter referred to as "the Act"]. The proposals for penalties allege sixteen violations of safety standards.

Pursuant to notice, a hearing on the merits was held in Fort Dodge, Iowa on May 20 and 21, 1980. Raymond C. Weston, Sr., Carl L. Smith and Charles E. Peaton, federal mine inspectors, testified on behalf of the petitioner. Edward David Ammala, a supervisor for the Mine Safety and Health Administration, testified for the petitioner. Charles P. Becker and Harlan Von Seggren testified on behalf of the respondent. The parties filed post hearing briefs.

II. Stipulations

During the course of the hearing, the parties entered into the following stipulations:

1. The mine inspectors who issued the citations were employees of the Mine Safety and Health Administration and authorized representatives of the Secretary of Labor.

2. The Administrative Law Judge has jurisdiction of this case pursuant to section 107 of the Act.

3. The proposed penalties would not adversely affect the respondent's ability to continue in business.

4. The respondent is a medium-sized operator in the State of Iowa.

III. Motions

Counsel for the Petitioner moved that the record be left open after the hearing in order to allow him an opportunity to submit a computer printout sheet from the Office of Assessments showing respondent's record of past violations. The undersigned ordered that the record was to be left opened until such time as respondent's counsel received a copy of the printout. Respondent, in its post hearing brief, renewed its objection to the admission of the computer printout sheet on the grounds that respondent did not have the opportunity to cross-examine witnesses as to the history or relevancy of the proposed exhibit. Respondent's objection is hereby sustained and the exhibit will not be admitted into evidence. Therefore, the penalties assessed herein are based on the assumption that the respondent had no history of any violations prior to the violations alleged in the present cases.

On August 15, 1980, respondent filed a motion to strike petitioner's post hearing briefs. Respondent claims that the petitioner's late filing of the briefs has prejudiced the respondent. I disagree. Respondent has failed to demonstrate any prejudice. Therefore, its motion is denied and petitioner's briefs and the arguments contained therein have been considered.

IV. Settlement Approvals

In the case of Secretary of Labor v. Clay County Highway Department, CENT 80-30-M, Maudlin Construction Company, as the leasee of the Stellish Pit, accepted the defense in this matter. This case involved three alleged violations. Respondent agreed to, and has in fact already paid the proposed penalty of $32.00 for citation no. 176765. Citation Nos. 176766 and 176767 were dismissed by the petitioner on the ground that the accuracy of the test results could not be proven.

In docket number CENT 80-114-M, the respondent agreed to affirm citation no. 176800 and pay the proposed penalty in the amount of $22.00.

The proposed settlement agreements are hereby approved by the undersigned.

V. Discussion

The five remaining cases involve four different mine sites, the Mortvedt, Solberg, Nelson and Clark Pits. The initial inspections at these pits took place between July 9, 1979 and September 18, 1979.

CENT 80-141-M and CENT 80-114-M

Cases CENT 80-141-M and CENT 80-114-M involve six citations all alleging a violation of mandatory safety standard 56.5-50.[1] These citations, involving similar issues of fact and law, will be dealt with together.

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[1] 56.5-50. Mandatory. (a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971, "General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, may be examined in any Metal and Nonmetal Mine Health and Safety District or Subdistrict Office of the Mine Safety and Health Administration.

PERMISSIBLE NOISE EXPOSURES

Duration per day, hours of exposure:	Sound level dBA, slow response
8	90
6	92
4	95
3	97
2	100
1-1/2	102
1	105
1/2	110
1/4 or less	115

No exposure shall exceed 115 dBA. Impact or impulsive noises shall not exceed 140 dB, peak sound pressure level. Note. When the daily noise exposure is composed of two or more periods of noise exposure at different levels, their combined effect shall be considered rather than the individual effect of each.

If the sum $\frac{C_1}{T_1} + \frac{C_2}{T_2} \cdots \frac{C_n}{T_n}$

then the mixed exposure shall be considered to exceed the permissible exposure. C_n indicates the total time of exposure at a specified noise level, and T_n indicates the total time of exposure permitted at that level. Interpolation between tabulated values may be determined by the following formula:

$$\text{Log } T = 6.322 - 0.0602 \text{ SL}$$

Where T is the time in hours and SL is the sound level in dBA.

The following issues pertain to citation nos. 175215, 175217, 175216, 175319, 175320 and 176783:

1. Did the testing procedures employed by the mine inspectors in measuring the noise levels conform to the procedures, as set forth in 56.5-50(a), and

2. Were the instruments properly calibrated in order to assure accurate noise level readings.

Respondent disputes the accuracy of the testing procedures used by the inspectors, attacking them in several ways. Only respondent's first two arguments need to be examined in order to reach a decision.

First, respondent argues that a sound level meter must be used to check or convert the dosimeter readings. (Respondent's brief at p. 4) Contrary to respondent's argument, I have found nothing in the Act that requires that sound level meters be used in conjunction with dosimeters. The applicable standard, found at 30 C.F.R. 56.5-50(a), requires that a sound level meter or a dosimeter with similar accuracy be used in testing noise levels. While respondent's expert, Harlan Von Seggren, testified that he would not use a DuPont 376 dosimeter alone for determining noise levels, nothing in the record supports a conclusion that this type of dosimeter cannot be used to accurately determine noise levels.

Secondly, respondent alleges that the test results are inaccurate due to the length of time between when the dosimeters were calibrated and when the tests were performed. Citations 175215, 175216 and 175217 were all issued on August 17, 1979 by Raymond Weston, Sr.. Mr. Weston testified that he calibrated the instruments on July 20, 1979, a period of 27 days prior to the inspection (Tr. 39). Citations 175319, 175320 and 176783 were issued on July 25, 1979 by Carl L. Smith. The dosimeters used by Smith were calibrated on July 6, 1979, 18 days prior to testing (Tr. 220).

The inspectors testified that they had been instructed that the dosimeters were to be calibrated every 30 days and that the instruments should be calibrated prior to an inspection (Tr. 243). However, neither inspector felt that it was necessary to calibrate the instruments the day before or the day of the inspection.

Edward Ammala, supervisory inspector for the western half of Iowa, stated that one of his duties as a supervisor is to review the citations that have been issued. He stated that he checks for any discrepancy between the sound level meter readings and the results of the dosimeter tests. In doing so he claimed that he can tell by the dBA level approximately what the dosimeter reading will be (Tr. 268). He therefore concluded that the dosimeter readings in the citations in question were accurate.

I find the testimony of respondent's expert to be more credible than that of the Petitioner's witnesses. Harlan Von Seggren stated that, in order to assure an accurate reading, a dosimeter must be calibrated, immediately prior to conducting the test (Tr. 153). According to Mr. Von Seggren, a dosimeter is a very sensitive piece of equipment and can easily be affected by temperature changes, movement and other outside influences. In his opinion, the lapse of time between the calibration of the instruments and the actual tests would invalidate the results. Petitioner failed to offer any testimony to refute the statements of Mr. Von Seggren.

Petitioner's explanation for not calibrating the dosimeters closer to the time when the tests were going to be performed was that it takes approximately twenty minutes to calibrate each machine. I find this explanation unacceptable. Section 104 of the Act requires that when a violation is found that a citation must be issued and a penalty assessed. It is grossly unfair to operators to subject them to testing procedures, the accuracy of which cannot be proven, in order for the inspectors to save time. The burden of proving the accuracy of test results is with the Petitioner. The Petitioner having failed in his burden, the citations are hereby vacated.

CENT 80-201-M

This case involves three citations. Citation Nos. 176795 and 176796 both allege a violation of mandatory safety standard 30 C.F.R. 56.14-1.[2] Citation No. 176797 alleges that respondent violated mandatory safety standard 30 C.F.R. 56.11-1.[3]

At the conclusion of Petitioner's evidence, respondent moved to dismiss the citations on the ground that the government had failed to establish a prima facie case. Respondent did not present any evidence nor offer any testimony as to these citations. At the time of the hearing, I reserved my ruling on respondent's motion until I had an opportunity to review the record. Having done so, I conclude that respondent's motion to dismiss should be granted and the citations dismissed.

The only testimony offered by Petitioner was that of the inspector who issued the citations. The inspector could not identify the photographs that he had allegedly taken and his notes were contradictory (Tr. 319 and 326).

The issuance of a citation is insufficient to establish a prima facie case. Petitioner having failed to offer any credible testimony to prove the existence of the alleged violations they are hereby dismissed.

2/ 56.14-1. Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

3/ 56.11-1. Mandatory. Safe means of access shall be provided and maintained to all working places.

CENT 80-121-M

Issues:

1. Whether or not the front end loader was equipped with an operative back up alarm and, if so,
2. Did this defect affect the safety of miners.

Discussion

Citation 175313 alleges that respondent violated mandatory safety standard 30 C.F.R. 56.9-2 [4] by failing to have an operative back up alarm on a front end loader.

The uncontradicted testimony of Carl Smith, the inspector who issued the citation, was that the front end loader had been equipped with a back up alarm; however, at the time of his inspection on July 9, 1979 it was inoperative.

Respondent contends that there was no violation, even though the alarm was inoperative, because the alarm was an additional safety feature installed by the respondent, which was not required by the Act. I disagree. The fact that the alarm was inoperative subjects the respondent to liability under 30 C.F.R. 56.9-2, unless there is a showing that even though the alarm was not working it would not affect the safety of respondent's employees.

Witnesses for both parties testified that the operator of the loader would not have a clear view of someone on the ground (Tr. 334 and 355). Although the testimony of the witnesses differed as to how far the view of the operator would be obstructed, it is unrefuted that there was a blind spot. Based on this fact and the testimony of Mr. Smith that he observed other employees working in the immediate vicinity, I find that a violation did occur.

Penalty

The likelihood of an injury resulting from this violation was remote since the loading process was confined to a small area and most of the employees in the loading area would be in trucks. However, if an accident were to occur it could be of a serious nature. The respondent acted in good faith by trying to abate the citation immediately. For these reasons, I find that a penalty of $40.00 is appropriate.

4/ 56.9-2 Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

Citation 176794 alleges that respondent violated 30 C.F.R. 56.12-8[5] by failing to provide a bushing on the conductor where it entered the distribution box on a light. The uncontradicted facts are that the wires were not equipped with a bushing, but that they were insulated with tape. The power source for the light was a portable generator, that in turn received its power from a diesel engine (Tr. 358). Therefore, there was never any reason for any employees to be in the vicinity of the lightpole (Tr. 359).

I find that a violation did occur. Although respondent argued that the tape eliminated any shock hazard, the standard requires that when wires pass through metal frames the holes must be bushed.

Penalty

I find that respondent's negligence and the gravity of the violation were low based on the evidence presented that the wires had been insulated. It appears there was only a slight chance of anyone being injured since it was not necessary for anyone to be near the light in order to turn it off or on. The respondent promptly abated the citation. For the reasons stated herein, I reduce the proposed penalty and conclude that a penalty of $10.00 is appropriate under the circumstances.

In citation no. 176799, the petitioner alleges a violation of safety standard 30 C.F.R. 56.4-18,[6] based on the inspector's statement that oxygen cylinders were being stored in the parts trailer where oil and grease containers were also kept (Tr. 313). According to Mine Inspector Carl Smith, this condition created a fire hazard and would add to the intensity of a fire if one were to occur.

I find that a violation did occur. Respondent did not deny that the oxygen was being stored in the same trailer containing oil and gas cans. Respondent contends that a citation should not have been issued since the oxygen bottles were immediately removed. The Act provides that when a violation is found to have occurred that a citation is to be issued. Respondent's promptness in abating the citation goes to the company's good faith. Also, the fact that the trailer was parked away from the area where the employees were working and that they would only be in the area to pick up supplies goes to the gravity of the violation and not to whether a violation did in fact occur.

5/ 56.12-8 Mandatory. Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings [Section 56.12-8 made mandatory and revised at 42 FR 29420, June 8, 1977, effective July 8, 1977].

6/ 56.4-18 Mandatory. Oxygen cylinders shall not be stored in rooms or areas used or designated for oil or grease storage.

Penalty

Under the circumstances, as set forth above, I find that a penalty of $28.00 is appropriate.

Findings of Fact

1. Seventeen citations were issued to the respondent between July 9, 1979 and September 18, 1979 at five different mine sites. These facts alone do not constitute harassment on the part of MSHA, as alleged by the respondent.

2. Petitioner failed to prove the accuracy of the dosimeter readings.

3. Petitioner failed to establish a prima facie case with regard to the three citations contained in Docket No. CENT 80-201-M. Therefore, respondent's motion to dismiss is granted.

4. The back-up alarm on the front end loader was inoperative. This presented a safety hazard for employees working in the area, since the operator would be unable to see persons walking behind the loader.

5. The hole in the conductor box was not bushed as required by mandatory safety standard 30 C.F.R. 56.12-8.

6. Oxygen cylinders were being stored in the same trailer as containers of oil and grease thus presenting a fire hazard.

ORDER

Case	Citation No.	Assessment
CENT 80-30-M	176765	$ 32.00
CENT 80-114-M	176800	$ 22.00
CENT 80-121-M	175313	$ 40.00
CENT 80-142-M	176794	$ 10.00
	176799	$ 28.00
		$ 132.00

It is hereby ORDERED that Respondent pay the penalties totaling $ 132.00 within thirty (30) days from the date of this decision.

Virgil E. Vail

Virgil E. Vail
Administrative Law Judge

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DEC 18 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket No. VA 80-85
v.	:	A.C. No. 44-04048-03014V
	:	No. 1 Mine
LITTLE EGYPT COAL COMPANY, Respondent	:	

DECISION

Appearances: Catherine M. Oliver, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Harold Jackson, Little Egypt Coal Company, Grundy, Virginia, for Respondent.

Before: Judge Melick

Hearings were conducted in this case in Abingdon, Virginia, on November 5, 1980, following which I rendered a bench decision. That decision, which I affirm at this time, is set forth below with only nonsubstantive corrections.

> This proceeding is, of course, before me under section 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815, the "Act." The general issues are whether the Little Egypt Coal Company (Little Egypt) has violated the regulatory standards cited in the petition filed by the Department of Labor, Mine Safety and Health Administration (MSHA) in this case, and, if so, what is the appropriate penalty to be paid by Little Egypt.
>
> Section 110(i) of the Act sets forth the criteria that I should consider in arriving at an appropriate penalty for violations under the Act, namely: the operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's abililty to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

Now, I observe that the one citation before me is a section 104(d)(1) citation and the two orders before me are orders of withdrawal under section 104(d)(1). These ordinarily require for their validity certain specific findings regarding "unwarrantable failure" and "significant and substantial." Since this is a civil penalty proceeding, however, only the fact of the violation and the relevant criteria under section 110(i) of the Act will be considered.

Now, going to the one citation before me, Citation No. 696006, I find that the violation did occur as charged. The citation charges that dry, loose coal was permitted to accumulate approximately 35 feet outby Survey Station No. 2506, located in the No. 4 entry intake airway, adjacent to the belt entry. The "accumulation" was approximately 4 feet high, 20 feet wide, and 60 feet long.

The cited standard (that is, 30 C.F.R. § 75.400) reads as follows: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal and other combustible materials shall be cleaned up and not be permitted to accumulate in the active workings or on electrical equipment therein."

MSHA inspector Harold Burnett testified here today--and I find his testimony to be completely credible and on essential points uncontradicted--that on July 31, 1979, in the course of a regular inspection with Mr. Ball, another MSHA inspector, that he did in fact observe in the No. 4 intake entry the described stockpile of coal. He measured that pile of coal using a 50-foot rule and found the size as reported in the citation. His testimony is undisputed, so I find that the size of the material to be as it was cited.

Now, with respect to the combustibility of this material, I have some problems with Mr. Burnett's testimony because at one point he says, "My visual observations were not sufficient to determine the combustibility," and at another point he testified that in essence those observations were sufficient from which he could conclude that the material was combustible. Burnett did testify, however, that the material which looked like coal was indeed black, was in fact dry, and was in fact not intermixed with observable noncombustibles such as rock dust or pieces of cement block or sundry other noncombustible materials.

The equivocal testimony is, in any event, obviated by the laboratory tests on the samples taken by Mr. Burnett. The samples, taken at each end of this pile and one in the middle, showed only 30, 27, and 23 percent incombustible material, respectively. These tests therefore demonstrate the presence of a rather high percentage of combustible material.

Now, even if you do not accept Burnett's testimony regarding the combustibility of this material, Mr. Jackson himself (the owner of Little Egypt) testified that this stockpile was treated the same as any other coal that is shipped out of his mine, that is, it was sold as part of its mine product. Clearly, if this "accumulation" did not consist of combustible materials to a significant degree, it could not have been so disposed.

Now, from the vast size of the stockpile alone, which was 4 feet high, 20 feet wide and 60 feet long, I conclude also that it was indeed an "accumulation" within the ambit of recent decisions by the Mine Safety and Health Review Commission. Secretary v. Old Ben Coal Company, 1 FMSHRC 1954 (December 1979); Secretary v. Old Ben Coal Company, 2 FMSHRC 2806 (October 1980). Now, indeed, even though the Commission has indicated that it is not necessary in proving a violation of this standard that some time have had elapsed while that "accumulation" remains, it is apparent from Jackson's own testimony that the "accumulation" had in fact existed since the previous day.

Now, I also find that Little Egypt was grossly negligent in allowing this coal to accumulate as it did. Jackson admitted that beginning in the middle of July 1979, because his union employees were supposed to be working only parttime on alternate days, he could not ship his coal out of the mine every day of the week as he desired. As a result, he found it economically necessary to stockpile the coal inside the mine for short periods of time. It was therefore a company policy to keep coal accumulated at least for that 1-day period or until such time as the coal could be shipped out. So I find that clearly the operator not only knew that this accumulation was present but in fact actively condoned maintaining such accumulations. As further evidence of the operator's negligence in this case, I note that Jackson admittedly had two "accumulations" in the mine and that although he had two scoops available, he used only one for cleanup while he continued to use the other for production.

Now, the condition did present a hazard and this testimony, again, is essentially uncontradicted that combustible materials such as this could be ignited and could cause fire or an explosion not only in the immediate section but the entire mine and there were potential, if not then existing, sources of ignition not far away. Burnett testified that there were electrical cables in an adjacent entry some 60 to 70 feet away, that there was a battery-operated scoop operating as close as 20 feet to the accumulation, and that there was a supply station some 40 or 50 feet from the accumulation in which timber, oil, and other combustible materials were stored. Explosives were also stored in the mine. Of course, the seven or eight men who were working in the mine at that time could be killed by any resulting explosion or fire. The degree of hazard is somewhat reduced by the fact that no defects were found in the cables and no permissibility violations were found on the equipment. Moreover, this mine has no history of methane problems and on the date of the inspection no methane was detected. I have taken these factors into consideration.

Now, with respect to the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation, the testimony is that indeed the condition which was cited at 10:15 a.m. was abated by 9 o'clock the next day. The foreman stopped all production in the mine and had two scoops immediately clean up the accumulation. However, as Inspector Burnett points out the operator really had no choice but to clean up the condition because he would not otherwise have been permitted to continue mining.

Order No. 696007 charges that roof-bolt test holes had not been drilled at 15-foot intervals, beginning approximately 80 feet inby Survey Station No. 2506 located in the No. 4 entry on the 001 section, and extending inby to the working faces of the Nos. 4 through 1 entries and connecting crosscuts for a distance of approximately 300 feet.

The cited standard, 30 C.F.R. § 75.200, deals essentially with the requirements for filing and having an approved roof-control plan in effect. However, that standard has been interpreted by the former Interior Board of Mine Operations Appeals and various administrative l judges in the Mine Safety and Health Review Commission, including myself, to require also that the operator comply with his roof-control plan. That is the interpretation I shall follow here.

Now, that part of the roof-control plan cited here appears on Page 7, Item 9 of Exhibit D, and states as follows:

> In each active working place where roof bolts are installed during a production shift at least

> one roof bolt hole shall be drilled to the depth of at least twelve inches above the anchorage horizon of the bolts being used to determine the nature of the strata. Such test holes shall be drilled at intervals not to exceed fifteen feet, and the test holes shall either be left open for examination or a bolt length equal to or greater than the required test hole depth may be installed and tightened.

Inspector Burnett, again without contradiction, testified that indeed the condition that was cited did in fact exist. The violation is therefore proven. Burnett conservatively estimated that even assuming the best of mining conditions it would take approximately 4 or 5 days with one shift operating to progress 300 feet in a mine such as the Little Egypt Mine. Since the test holes had not been driven over that distance it is apparent that the cited condition had existed for at least 4 or 5 days. The fact that the condition existed for such a long period of time indicates that the operator was also negligent. This violation should have been detected in the course of the preshift and onshift examinations over this 4- or 5-day period. I also consider in terms of negligence the fact that this mine had indeed been cited before (and this is conceded by Mr. Jackson here today) for violations of the same nature.

Now, I can sympathize to some extent with the operator's problem. I take into consideration that his roof-bolting machine operator was negligent in failing to perform a duty that he had been instructed to perform and in fact had been previously reprimanded for failing to perform in the past. However, that does not exonerate the foreman and the mine operator from liability for this type of violation. Indeed, if this same violation had occurred in the past, the operator had perhaps an increased duty to see that the same violation did not occur again.

The hazard in this situation was serious because the test holes are used to evaluate roof conditions and if indeed the roof-bolting machine operator is not performing these tests, the roof bolts that he is implanting could be of no use at all because defects may very well exist in the strata just beyond the reach of his bolts. Of course, the danger present here is from roof falls causing death or serious injuries to anyone working on that section.

I note that this condition was abated within the time allotted but, again, I observe the operator really had no choice if he wanted to continue mining.

I find also that the violation in Order No. 696003 has been proven as charged. The order states as follows: "The No. 4 entry has been driven from twenty-four to twenty-eight feet wide, beginning ninety feet in-by Survey Station No. 3506, located in the No. 4 entry and extending inby for a distance of approximately thirty-three feet on the 001 section." The inspector commented that this had become a common practice at this mine and indicated that the approved roof-control plan permits a maximum width of 20 feet.

Now, again, the standard cited here is 30 C.F.R. § 75.200 which is the standard relating to the requirement for the filing of and approval of a roof-control plan. The roof-control plan in effect here required, in relevant part, on Page 4 that the entry width and the crosscut width shall be 20 feet.

The testimony is undisputed that the widths in the No. 4 entry were precisely as charged, that is, from 24 to 28 feet. The measurements were precisely made, again, with a 50-foot tape with the assistance of Inspector Ball. The hazard from this overwide entry is, of course, from a weakened roof resulting in possibly fatal roof falls. The condition was abated within the time specified for abatement by adding timbers to bring the width to within the 20 feet specified in the roof-control plan.

Now, certain criteria under section 110(i) are appropriate to consider across the board, and are common to all of the orders and the citation at issue. One of those criteria is the size of the operator. The operator here is small having only 10,704 production tons per year. With respect to a history of previous violations, the printout admitted as Government Exhibit F does not provide sufficient detail for me to really determine the specific nature of the previous violations. I am, of course, considering only those violations in which a penalty has actually been paid since those are the only ones that have become final as of this date. It appears, however, that the operator does not have a significant history of violations.

Now, considering what effect penalties might have on the operator's ability to continue in business, I note that Mr. Jackson has testified that even the penalties proposed by the Department of Labor would have such an effect. However, Mr. Jackson has been given the opportunity to obtain and to present documentary evidence to support his testimony here but has chosen not to. Apparently, that evidence is not in a form in which it could be readily presented to the court, but since nothing has been presented, I cannot give great weight to the unsupported testimony. If, indeed Jackson could reach the conclusions he reached here today, it must have been based upon some records.

All right, considering all of these factors, I feel that the following penalties are appropriate for the violations that I have found:

With respect to Citation No. 696006, a penalty of $400.

With respect to Order No. 696007, a penalty of $250.

And with respect to Order No. 696008, a penalty of $300.

ORDER

The Little Egypt Coal Company is ORDERED to pay a penalty of $950 within 30 days of this order.

Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 18 1980

DALE A. EAGLE,	:	Complaint of Discharge
Complainant	:	
v.	:	Docket No. WEVA 80-487-D
	:	
SOUTHERN OHIO COAL COMPANY,	:	Martinka No. 1 Mine
Respondent	:	

DECISION

Appearances: P. Lee Clay, Esq., Fairmont, West Virginia, for Complainant;
D. Michael Miller, Esq., J. Statler Beachler, Esq., Columbus, Ohio, for Respondent.

Before: Judge Melick

This case is before me upon the complaint by Dale A. Eagle under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801 et seq., the "Act"), alleging an unlawful discharge of him by the Southern Ohio Coal Company (Southern). A hearing was held on October 28 and 29, 1980, in Morgantown, West Virginia, at which both parties, represented by counsel, appeared and presented evidence.

The issue in this case is whether Mr. Eagle was unlawfully discharged by Southern in violation of section 105(c)(1) of the Act because of his alleged safety-related activities at Southern's Martinka No. 1 Mine. Section 105(c)(1) reads in part as follows:

> No person shall discharge or in any other manner discriminate against * * * or otherwise interfere with the exercise of the statutory rights of any miner * * * because such miner * * * has filed or made a complaint under or relating to this Act, including a complaint notifying the operator or the operator's agent, or the representative of miners * * * of an alleged danger or safety or health violation * * *, or because such miner * * * is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner * * * has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such

> proceeding, or because of the exercise by such miner * * * on behalf of himself or others of any statutory right afforded this Act.

Before hearing, Southern moved to dismiss the complaint on the grounds that, inter alia, Eagle as a nonunion management employee was not a "miner" within the scope of section 105(c)(1) of the Act and that he was not therefore entitled to the protections afforded therein. The short answer to this contention is, however, found in the Act itself in which the term "miner" is unambiguously defined as any individual working in a coal or other mine. See section 3(g) of the Act. Nonunion management personnel working in a coal mine are therefore "miners" for purposes of section 105(c)(1) and are accordingly entitled to the protections afforded therein.

Southern also alleged in its motion that Eagle's complaint did not state facts sufficient to bring the claim within the ambit of activities protected by section 105(c)(1). Eagle maintains that his claim of unlawful discharge is grounded upon his exercise of a statutory right afforded under the law of West Virginia. Since the provisions of section 105(c)(1) do in fact limit the protected rights of miners to only those statutory rights recognized by the Federal law it is clear that a right found only in State law and not recognized by the Federal law does not give rise to a valid claim under section 105(c)(1). Whether or not the alleged right is protected by the law of any State is therefore immaterial. The test is whether that right which may or may not also be recognized by State law is one protected by the Federal mine safety law.

The complaint here, as clarified at hearing, appears to be that foreman Dale Eagle was fired because he made the decision to take his men off production-type work to correct what is claimed to have been an imminently dangerous safety defect in the mine ventilation system. I conclude that such activity would indeed be protected under the Act. In the case of Secretary (o.b.o. David Pasula) v. Consolidation Coal Company, 2 FMSHRC ____ (October 14, 1980), the Federal Mine Safety and Health Review Commission found that the refusal of a miner to work in unsafe or unhealthful working conditions was a protected activity within the purview of the Act. I find that a decision to correct a serious safety or health hazard rather than to perform production-type work is the essential equivalent of refusing to work in unsafe conditions. The motion to dismiss filed herein is therefore denied.

For the reasons that follow, however, I conclude that on the facts of this case the allegations in the complaint cannot be supported. Even assuming, arguendo, that the hazard alleged by Eagle was an imminently dangerous one requiring immediate corrective action (which in reality it was not) it is clear that the decision by Clark Morris, general foreman for the Martinka No. 1 Mine, to discharge Eagle was made without knowledge of any such alleged hazard and without knowledge of the alleged protected activity but was based upon grounds completely independent of any protected activity.

The essential facts are as follows. On March 3, 1980, Complainant Eagle was foreman of a six-man work crew on the 8:00 to 4:00 day shift. His crew and a crew under foreman Harold "Dick" Barr were working together that day setting up the steel framework for a new conveyor belt. The crews would begin about 100 feet apart and work toward each other in completing a particular section. At the beginning of the shift, project supervisor Chuck Sponsler had warned Eagle and Barr to be sure they kept their men busy that day because they were expecting a visit from mine officials.

According to Eagle, at around 2:40 p.m., he saw several of the mine officials including Mine Foreman Morris. Morris wanted to know the identity of some miners who were standing idle at the nearby power center. Eagle agreed to check on the problem but claimed they were not his men. Eagle later learned that he was discharged by Morris at the end of the shift around 4:00 p.m. when he was filling out his time sheets. Eagle concedes that he did not know whether Morris was aware that he had assigned his men to the alleged safety work (repairing the return air doors) before he was discharged.

Morris testified that he entered the mine at around 2:00 p.m. accompanied by Mine Superintendent Tompkins and several other officials. Arriving at the power center, he heard men laughing and talking loudly and saw that the dinner hole was full of men. One of the men told Morris that they had progressed to the water hole (a pool of water through which the belt line would have to pass) and then "knocked off" for the day. 1/ Morris recognized later that several of this group of 10 or 11 men at the dinner hole were from Eagle's work crew. Some of the men were even dressed to leave for the day although it was an hour before quitting time. Morris located Eagle and Barr and told them to find some work for the men. Morris had previously warned Eagle and Barr about stopping work before the end of the shift.

Morris later returned at around 3:15 to see if the men were working. As he passed through the "16-switch" ventilation doors he saw several of the miners without tools sitting in the mantrip and two standing beside it ready to leave for the day. Outraged, Morris at this point decided to fire Eagle and Barr and told Tompkins of this decision. When Eagle and Barr later came outside at the end of the shift, he told them they were fired. Morris testified that he did not know of any plans Eagle may have had to work on the ventilation doors until he was told of this allegation by Sponsler. By that time the decision to release the men had already been made.

Sponsler, the project supervisor, testified that around 3:00 p.m. he too saw a group of what he thought was about eight to 10 men at the dinner hole. Barr and Eagle were then about 200 feet away. When asked about the idle men, Eagle told him "I don't want to hear no shit, I am going to have

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1/ According to one of the miners called by Eagle to testify, no one wanted to work in this water hole so it was decided to leave that work for the night shift. Eagle was quoted as saying "We can't quit now, you might as well go fix some doors * * * it's too early to quit". These do not sound like the words of a man intent on correcting an imminent danger.

some men fix the doors." Sponsler did not have occasion to tell Morris of the purported project until later. Morris by that time had already made up his mind to fire Barr and Eagle for their repeated failure to keep the men working.

James Tompkins, superintendent of the Martinka Mine, accompanied Morris that afternoon. He too heard the laughter and noise around the power center and observed some 10 to 11 idle men in that area. He also recalled that they later found four or five men in the vicinity of the "16-switch" doors just sitting in the "bus" (mantrip) laughing. It was about this time that Morris told Tompkins that Barr and Eagle would have to go. Tompkins agreed with the decision.

Although Barr thought that he had told Morris when confronted by him in the mine that the idle men were preparing to fix ventilation doors, he was not certain of this. I do not believe that this was an accurate recollection inasmuch as Morris specifically denied having this information before making his decision to fire the men, and the testimony of Tompkins, Sponsler and indeed even Dale Eagle himself corroborates Morris on this point. Barr concluded, moreover, that he and Eagle were fired not because of any anticipated safety work but because Morris indeed found their men at a time when they were not actually working.

Under the circumstances, I conclude that Mine Foreman Morris made the decision to discharge Barr and Eagle for reasons unprotected by the Act and that indeed he made the decision without any knowledge of Eagle's alleged protected activity, *i.e.*, his anticipated repair work on ventilation doors. 2/ The discharge was therefore not motivated in any part by the alleged protected activity. *Pasula*, *supra*. Eagle's complaint cannot therefore be supported and is accordingly dismissed.

Gary Melick
Administrative Law Judge

2/ The decision of a trial examiner for the West Virginia Department of Employment Security that Eagle was not discharged for misconduct and was thus eligible for unemployment insurance benefits is not necessarily inconsistent with my findings herein but would not in any event have been accorded great weight. That determination has been appealed by Southern and has therefore not become final. Moreover, Southern was not represented by counsel at the hearing, the hearing commenced without the presence of any company representative, and several key witnesses for the company, including Morris, were not present. The record before the examiner was, as a result, woefully inadequate. Since the Complainant has also failed to submit the rules and regulations governing such proceedings as he was directed to do, I am unable to ascertain the standards applicable thereto. The fact that Eagle claimed at that hearing that he was discharged because of a personality conflict with Morris and not for the reasons now advanced does, however, reflect on the credibility of his complaint herein.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

DEC 2 2 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v.	:	Civil Penalty Proceeding Docket No. YORK 79-49-M A/O No. 19-00019-05001
S. M. LORUSSO & SONS, INC., Respondent	:	Wrentham Quarry & Mill

DECISION

Appearances: David Baskin, Esq., Office of the Solicitor, U.S. Department of Labor, Boston, Massachusetts, for Petitioner, MSHA; Kenneth Arthur, S. M. Lorusso & Sons, Inc., Walpole, Massachusetts, for Respondent, S. M. Lorusso & Sons, Inc.

Before: Judge Merlin

The above-captioned case is a petition for the assessment of civil penalties filed by MSHA against S. M. Lorusso & Sons, Inc.

The Solicitor had filed a motion for settlement which I disapproved on August 12, 1980. As I stated at the hearing, the Solicitor's motion set forth some reasons to support a settlement but, in my opinion, they were not adequate. However, at the hearing, the Solicitor furnished additional reasons and detailed explanations which did warrant approval of his recommendations. The approved settlements are as follows:

Citation No. 217543 was issued when the plant manager was observed not wearing protective footwear. The original assessment was $44; the recommended settlement was $10. In support of the reduction, the Solicitor advised that there was no negligence on respondent's part with respect to this violation. The operator purchases protective footwear for its employees and instructs them to wear it. This employee had simply disobeyed company rules. I accepted the Solicitor's representations and approved the settlement.

Citation No. 217545 was issued when the plant manager was observed not wearing protective headwear. The original assessment was $44; the recommended settlement was $10. The Solicitor gave the same reasons in support of the reduction as were given for Citation No. 217543. I accepted the Solicitor's representations and approved the settlement.

Citation No. 217546 was issued when a guard on a conveyor belt drive that had been removed for servicing was not reinstalled prior to restarting the belt drive. The original assessment was $60; the recommended settlement was $50. In support of the reduction, the Solicitor advised that this is a small operator and that this was the first inspection after the plant had started up operations for the season. In light of the small amount of the proposed reduction, I approved the recommended settlement.

Citation No. 217547 was issued when a railing surrounding the primary crusher was found not to have been put in place prior to starting up the crusher. The original assessment was $66; the recommended settlement was $50. In support of the reduction, the Solicitor advised that it was company practice to instruct employees not to remove these railings, and that if they had to be removed, they must be replaced. An employee simply had not replaced the railing. I accepted the Solicitor's representations and approved the settlement.

Citation No. 217548 was issued when two electric drop cords were found being used without ground connectors. The original assessment was $38; the recommended settlement was $20. In support of the reduction, the Solicitor advised that there was a very low probability of occurrence. The small size of the company and the small history of prior violations was also noted. In light of these factors, I approved the recommended settlement.

Citation No. 217551 was issued when a shaker screen guard which had been removed for servicing was not replaced. The original assessment was $60; the recommended settlement was $40. In support of his motion, the Solicitor cited the same factors which supported the settlement for Citation No. 217546 and further advised that there was only an extremely remote likelihood that a person would come in contact with the dangerous parts of the machinery. I accepted the Solicitor's representations and approved the settlement.

Citation No. 217552 was issued when a guard on a conveyor belt head pulley which had been removed for servicing was not reinstalled prior to starting up the machine. The original assessment was $60; the recommended settlement was $50. In support of the reduction, the Solicitor cited the same factors which warranted the reduction for Citation No. 217546. The Solicitor further advised that there was a very low probability of any injury occurring and that the operator's negligence was very low, given the fact that the plant was beginning to start up for the new season. In light of the foregoing factors and the fact that this was not a particularly large reduction, I approved the settlement.

Citation No. 217555 was issued when it was observed that the traffic rules pertaining to speed limits on the haulage road were not posted. The original assessment was $52; the recommended settlement was $20. In support of the reduction, the Solicitor advised that both negligence and gravity were less than were originally thought since the rules had been posted but they were either destroyed or taken down because of the winter weather. The Solicitor further advised that the drivers are aware of the speed limits, and the rules are posted in the company office. I accepted the Solicitor's representations and approved the settlement.

I recognized that the original assessments for these citations were not large. However, at the hearing the Solicitor did advise that this operator is small in size and had a very small history of prior violations. In light of these factors, the recommended reductions are appropriate.

ORDER

The rulings issued from the bench on November 24, 1980, are hereby AFFIRMED.

The operator is ORDERED to pay $250 within 30 days from the date of this decision.

Paul Merlin

Paul Merlin
Assistant Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

DEC 24 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING
v.	DOCKET NO. WEST 79-195-M
	A/O NO. 02-01642-05001
ARIZONA CRUSHING COMPANY, Respondent.	MINE: PORTABLE CRUSHER

DECISION

APPEARANCES:

Sandra Rogers, Esq., Office of Daniel Teehan, Regional Solicitor, United States Department of Labor, San Francisco, California for Petitioner

Peter J. Ranke, Comptroller, appearing pro se, Phoenix, Arizona for the Respondent.

Before: Judge John J. Morris

Petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges that respondent, ARIZONA CRUSHING, failed to guard its conveyor equipment, thereby exposing its employees to hazardous pinch points. MSHA asserts ARIZONA CRUSHING thereby violated 30 CFR 56.14-1,[1] a regulation promulgated under the authority of the Federal Mine Health and Safety Act (amended 1977), 30 U.S.C. § 801 et seq.

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[1] The cited standard provides as follows:

GUARDS

> 56.14-1 MANDATORY. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

ISSUES

The issues are whether MSHA has jurisdiction and whether the violations occurred.

CONTENTIONS

ARIZONA CRUSHING contends that Congress did not intend to include sand and gravel operations in the scope of the Act. I disagree. The legislative history indicates otherwise. In reviewing the safety record for metal and nonmetal mining, the United States House of Representatives included data on the number of fatalities occurring in open pit, sand and gravel mines, stone quarries, and mills. House Report No. 95-312, 95th Cong. 1st Sess. 6 (1977). Congress also directed that any doubts over the extent of MSHA's jurisdiction are to be resolved in favor of inclusion within the Act. Senate Report No. 95-181 95th Cong. 1st Sess. 14 (1977).

The determination that sand and gravel pits are under the jurisdiction of the Act has been upheld in recent decisions. Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589 (3rd Cir. 1979), Cert. denied, 444 U. S. 1015 (1980); Marshall v. Cedar Lake Sand and Gravel Co. 480 F. Supp. 171 (E. D. Wisc. 1979); Marshall v. Wallach Concrete Products, Inc., et al, Docket No. 79-422 _____F. Supp. ______(D.C. N.M. 1980).

PENDING LEGISLATION

ARIZONA CRUSHING asserts there is legislation pending in the United States Congress that would remove MSHA's jurisdiction over sand and gravel operations.

As of the date of this decision no legislation has been passed that would affect MSHA's jurisdiction. Accordingly, such argument is overruled.

FINDINGS OF FACT

Citation 379481

1. The return roller of the primary feed conveyor was unguarded (Tr. 10 - 12, P-1).

2. The three foot long pinch points were 5 to 5 1/2 feet above the ground (Tr. 12, P-1).

3. When the conveyer was operating the cleanup man or workers observing the plant would be in close proximity to the hazardous pinch point (Tr. 12 - 15).

CITATION 379482

4. The pinch points of the warp drive on the primary feed conveyer were guarded at the front but not at the sides (Tr. 16 - 18, P3, P4, P5).

5. Workers could come between the guard and the motor within six inches of the pinch points during maintenance and cleaning operations (Tr. 23).

CITATION 379484

At the commencement of the trial petitioner moved to vacate this citation for the alleged violation of 30 C.F.R. 56.14-1 (Tr. 5).

The motion to vacate was granted at trial and is formalized in this decision.

CITATION 379485

6. The west side of the V belt on the primary feed conveyer was guarded but there was an exposed pinch point between the guard and the motor (Tr. 23, P6).

7. Workers had access to this area and could come in contact with the V belt drive (Tr. 23).

CITATION 379486

8. The El Jay rock belt tail pulley was unguarded (Tr. 25 - 29, P8).

9. A portion of the tail pulley was guarded but there were unguarded pinch points at the bottom of the frame (Tr. 26 - 27).

10. Workers by using a walkway or path could come within a few inches of the pinch points (Tr. 28, P8).

ALL CITATIONS

11. Before the inspection ARIZONA CRUSHING had removed its conveyer equipment because a large amount of water was being released into the riverbed.

12. The inspection occurred as ARIZONA CRUSHING was reassembling its equipment.

13. The guards had not yet been reinstalled and the equipment was being tested.

ARIZONA CRUSHING asserts it should not be cited because its workers were not crushing rock but were merely reassembling the equipment. I find the facts supporting ARIZONA CRUSHING's view but I do not concur that such facts establish a defense. It is undisputed that the equipment was running and being tested (Tr. 76). In various ways the workers were exposed to the hazards prohibited by the standard. (Findings of Fact, paragraphs 3, 5, 7, 10).

To synthesize this decision: pinch points must be guarded whenever the workers, in the normal course of their duties, are in close proximity to the hazards.

CIVIL PENALTIES

ARIZONA CRUSHING asserts that the negligence assessed for Citation 379485 is unduly high. I disagree, the condition is obvious and the photograph of the condition indicates ready exposure to the pinch point (P6).

However, in connection with the civil penalties, MSHA's proposed assessment does not credit ARIZONA CRUSHING for its immediate abatement of the conditions. Further, it is company policy to immediately comply with all MSHA directives. In view of the above factors and in consideration of the remaining statutory criteria,[2] I conclude that the proposed civil penalties should be reduced as set forth in the order of this decision.

ORDER

Based on the foregoing findings of fact, conclusions of law, and motion I enter the following order:

1. Citation 379481 is affirmed and a penalty of $14.00 is assessed.
2. Citation 379482 is affirmed and a penalty of $14.00 is assessed.
3. Citation 379484 and all penalties therefor are vacated.
4. Citation 379485 is affirmed and a penalty of $17.00 is assessed.
5. Citation 379486 is affirmed and a penalty of $18 is assessed.

John J Morris
John J. Morris
Administrative Law Judge

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[2] 30 USC 820(i)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 30 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. MATHIES COAL COMPANY, Respondent	Civil Penalty Proceeding Docket No. PENN 80-277 A/O No. 36-00963-03096V Mathies Mine
MATHIES COAL COMPANY, Contestant v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Contest of Order Docket No. PENN 80-121-R Order No. 836843; 12/13/79 Mathies Mine

DECISION

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner-Respondent; William H. Dickey, Jr., Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent-Contestant.

Before: Judge Charles C. Moore, Jr.

Mathies Coal Company was served with an order alleging a violation of its roof control plan because it seemed obvious to the inspector that the operator of the continuous miner in a particular cut had been operating under unsupported roof. When the inspector first noticed the unusually large unsupported area where Mathies had been constructing a track shoot (for its rail car haulage system) his eyeball measurement indicated to him that the depth of the cut was greater than the distance from the front of the continuous mining machine to the operator's controls on that machine. He then had the area supported and took measurements. One of his measurements showed it was 28 feet from the deepest cut to the nearest roof bolt. Since it was only some 22 feet 7 inches from the front of the continuous miner to the operator's controls, he assumed there had been a violation because the operator of necessity had been under unsupported roof.

After the issuance of the citation the representatives of Mathies were somewhat perplexed by the measurements but rather than accept the fact of violation they brought the continuous miner back into the track shoot area and found that they could not position the miner in the track shoot in such a way that the operator would be under unsupported roof. One of their discoveries was that it was 28 feet from the far left-hand corner of the cutting blade to the miner's controls which were located on the right rear of the machine.

At the hearing Mathies produced scale drawings of the track shoot showing the last line of roof bolts and a scale model of the continuous miner. The miner would not fit in the track shoot in any area in any way which would expose the operator of the machine to unsupported roof. Furthermore, Mathies produced the continuous miner operator who cut the track shoot in question, and he testified as to how he cut this track shoot and that at no time was he under unsupported roof.

While I can sympathize with the inspector's action, it is nevertheless true and I find it as a fact that no violation of the roof control plan or of 30 C.F.R. §75.200 occurred in this track shoot. The order is accordingly vacated and these cases are dismissed.

Charles C. Moore, Jr.

Charles C. Moore, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 30 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceedings
v.	:	Docket No. NORT 78-387-P A.C. No. 44-04251-02008V
CLINCHFIELD COAL COMPANY, Respondent	:	Docket No. NORT 78-388-P A.C. No. 44-04251-02009V
	:	McClure No. 1 Mine

DECISION

Appearances: Michael Bolden, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Gary W. Callahan, Esq., for Respondent.

Before: Judge William Fauver

These proceedings were brought by the Secretary of Labor under section 109(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq., for assessment of civil penalties for alleged violations of mandatory safety standards in October and November, 1977. The case was heard at Falls Church, Virginia. Both parties were represented by counsel. The Secretary of Labor has submitted his proposed findings, conclusions, and brief for Docket No. NORT 78-387-P, following receipt of the transcript.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. At all pertinent times, Respondent, Clinchfield Coal Company, operated a coal mine, known as the McClure No. 1 Mine, in Dickenson County, Virginia, which produced coal for sales in or substantially affecting interstate commerce.

2. Thyssen Mining Construction, Inc. (Thyssen), was an independent contractor engaged by Respondent to sink a return shaft at the McClure No. 1 Mine. In forming the shaft, Thyssen used a three-stage, circular work deck, which was suspended from the surface by four wire ropes in two parts. The

work deck had a diameter of 18 feet, 4-1/2 inches and weighed about 17,500 pounds empty and about 20,000 pounds fully loaded with men and materials. Through the center of the work deck was a bucket well about 5 feet in diameter that permitted a bucket (man hoist) to pass through all three stages and descend to the bottom of the shaft. The shaft was 237 feet deep and had a diameter of 20 feet. The concrete formwork for the shaft was 5 inches thick. Attached to the outside of the work deck and extending about 7 feet above the top stage and about 7 feet below the bottom stage were several anti-tilt riggers, which were designed to wedge against the shaft wall to limit tilting of the deck. The height of the work deck with the tilt-control riggers was 22 feet, 3 inches.

3. Around the outside perimeters of the work deck and the bucket well were separate post-and-chain barricades to prevent persons from falling over the edge of the deck or through the bucket well. The two barricades were circular and each consisted of two chains attached to posts. The top chain was about waist-high and the other one was about knee-high. The outermost barricade was about 6 inches inside the edge of the platform. Also, around the outside and inside edges of the deck were 6-inch kickplates to prevent people from slipping over the edge. The men wore cleated rubber boots and the deck had an anti-skid surface.

4. The workers were not required to and generally did not wear safety belts while working on the deck; however, some of the men did wear safety belts while the deck was moving. If the deck tilted, there was nothing to prevent a man from falling to the deck floor and, besides the two chain barricades, there was nothing to prevent an employee from falling against the shaft wall, from becoming caught between the shaft wall and the deck, or from falling through the bucket well.

5. There has never been an accident involving an employee falling against the shaft wall or lodging an arm or hand between the platform and the wall or falling through the bucket well.

6. The work deck was powered by four Hoyle winches, which served as spools for the wire ropes. Each winch, which was controlled by the hoist operator from the hoist room, was a drum about 16 inches in diameter with two flanges and was powered by a 15-horsepower motor with a capacity of 10,000 pounds. The No. 1 and No. 4 winches were mounted over the shaft opening on the collar coverings and the No. 2 and No. 3 winches were mounted on a concrete pad directly in front of the hoist room.

7. The motors that drove the winches produced a maximum line speed of about 45 feet per minute; however, with the wire rope in two parts, the speed was halved to about 22-1/2 feet per minute.

8. Each wire rope was five-eighths inch and had a breaking strength of 34,000 pounds. With the ropes in two parts, the load supported by each part was 2,500 pounds. Each rope contained seven strands of wire, each of which consisted of 19 smaller wires. The ropes were anchored underneath the

collar of the shaft to one of the collar beams and extended down to the work deck under a sheave wheel and back to the winch drum. The sheave wheels were welded and bolted to the work deck.

9. Title 30 of the Code of Federal Regulations, Part 77, incorporates the minimum safety factors for hoisting ropes established by the American National Standards Institute (ANSI). The ANSI safety factor of a hoisting rope was the factor by which the breaking strength of the rope exceeded the suspended load, related to the depth of the shaft. The recommended safety factor of a shaft 500 feet or less was 8. Under the ANSI system of determining the safety factor of hoisting ropes, any three of the four ropes on the subject work deck would combine to produce a safety factor of 10.44. The four ropes had a safety factor of 13.92.

10. Each of the four winches was equipped with an electric shoe-type brake made from an asbestos fiber. Each brake was spring-activated. Before a brake would release, the motor would have to assume 40 percent of its normal load and the brake would not begin to apply until power decreased to 10 percent of the normal load. Thus, at all times, either the motor would be applying power or the brakes would be activated.

11. When power was applied to the winch motors, the brakes automatically released so that the platform could move; when power was turned off, the brakes applied automatically. If the power source to the winch motors failed, the brakes were designed to activate automatically by spring action.

12. Each winch drum had a slot to receive a safety pin, also known as a safety "dog." The purpose of this pin was to prevent the drum from freewheeling if the brake failed while the deck was in a stationary position. The safety pin was a strip of metal, about 12 inches long, 2 inches wide, that inserted into the frame of the winch drum. The pin would stop the drum when the pin came into contact with a metal lug attached to the outer part of the drum. The metal lugs were 1-inch square and spaced 90 degrees apart so that, when a safety pin was inserted, the winch would rotate a maximum of 90 degrees before stopping at the next lug.

13. An employee on the surface, known as the topman, manually inserted the four safety pins upon instruction from the hoist operator. The operator maintained telephone contact with the workers on the deck because he was unable to see the winches from the hoist room. A bell signal notified the topman that the pins were ready to be inserted. It took 3 to 4 minutes to insert all four pins. There has been no case of failure of a safety pin.

14. The hoist operator tried to operate the four winches simultaneously so that the deck would be level; however, the deck often tilted because the winch motors operated at slightly different speeds and the stretching characteristics of the ropes were not uniform. Before the work deck reached a new resting position, the operator would make several adjustments to level the deck. When the deck was finally stopped the safety pins

would be inserted and power would be released so that the winches would roll back against the pins. One or two of the ropes might become slack when the winches rolled back. Before the deck was moved again, the pins would be removed and the hoist operator would try to level the deck by adjusting the winches one at a time. Three winches were capable of leveling the work deck.

15. If the air was damp, the shoes would absorb moisture and swell. During the 2 or 3 days prior to October 27, 1977, there were heavy rains that caused the brakes to drag and made lowering and raising the deck difficult. On October 27, the weather was drier and the brake shoes had shrunk back to their normal size.

The October Inspection

16. On October 27, 1977, federal mine inspector William H. Hulvey inspected the No. 2 shaft at Respondent's McClure No. 1 Mine. He arrived at the hoist room about 8:15 a.m. to inspect the three-stage work deck. He spoke briefly with the hoist operator and inspected the books.

17. The hoist operator was in the process of moving the work deck to a new resting place in the shaft. The safety pins had been removed and the fiveman crew, including the foreman, were on the work deck. A whole crew was needed to move the work deck safely because there were three stages and there were utility lines and other objects that might interfere with the wire ropes. One of the workers below was communicating with the hoist operator by telephone, instructing him to move the winches one at a time. The operator told the inspector that he was moving the winches one at a time because they were having difficulty leveling the deck. A work deck might be difficult to keep level for a number of reasons, e.g., the brake was not holding properly, the ropes were not spooling on the drums properly, or the winches were not hoisting synchronously.

18. At about 9 a.m., the operator lowered the inspector to the work deck. When he arrived the foreman said that they were trying to move the deck but were unable to keep it level. While the inspector was on the deck, the operator applied power to all four winches and the deck rose about 1 foot. After the power was turned off, the brakes applied and the inspector noticed a slight displacement on one side of the deck and slackness in one of the ropes. The inspector determined that the No. 3 winch rope was not holding its designated load. He believed that if one of the brakes was not supporting any weight, an added strain was placed on the other brakes. The inspector told the foreman to withdraw the men until the problem was diagnosed.

19. The operator raised the work deck and then released power. The No. 3 brake should have applied; however, the brake did not immediately hold the winch and about 1 foot of rope spooled from the drum before holding. They returned to the surface to inspect the No. 3 winch.

20. A mechanic then inspected the brake and found that it was out of adjustment, that it was slipping, and that the shoes were not holding the brake wheel.

21. Inspector Hulvey issued Order of Withdrawal No. 1-WWH (7-62) to Respondent, reading in part:

> The electrically operated magnetic brake (shoe type) installed on the No. 3 electric work deck winch was not maintained in safe operating condition. The brake would not hold the winch drum when power was disconnected to the winch drive motor. This allowed the cable to become slack and not hold its designated load. The No. 4 electric winch brake was the only brake holding the side of the circular-3 level work deck. Workmen were attempting to have the work deck hoisted up the shaft.

The cited condition was abated by adjusting the brake. Three days earlier, there had been a similar problem with this brake.

22. The inspector considered the problem serious because he believed that, if the work deck tilted and wedged against the shaft, one of the men could fall to the floor and injure himself or fall through the bucket well. He also believed that if the No. 4 winch brake also malfunctioned, one side of the deck would tilt and the wires could become damaged by contact with the upper stage of the platform of the deck.

23. The inspector found that the condition should have been discovered before his arrival. The shaft was required to be preshifted before the start of each shift and the hoisting equipment was required to be checked daily. However, the brakes would not be inspected unless the platform was going to be moved. If the platform remained stationary for several days, the brakes would not be examined before men descended to the work deck because the safet pins would prevent the winches from freewheeling. On October 27, there had been a preshift examination and the hoisting equipment was checked.

24. At about 7:30 a.m. on the date of the inspection, Ray Hobson, the fire boss, had preshifted the shaft area, including the man hoist, the winches and the hoist room. His inspection of the winch brakes did not include removing the guards that surrounded the brakes. He descended the shaft in the bucket and found only that a line needed extending at the bottom of the shaft.

25. The hoisting equipment was also inspected that morning, at about 8 a.m., by the hoistman. The hoistman inspected the ropes to see that they were in good operating condition, that there were no broken strands, and that they were aligned in the sheaves and not overlayed on the drums.

26. Thyssen recorded inspections made on the man hoist in the hoist inspection book. The man hoist was used to hoist men in and out of the shaft. Examinations of the deck winches, concrete form winches and emergency hoist winches were also recorded. There was no record in the book of an inspection of the Hoyle winches and the brakes.

27. Respondent's approved shaft-sinking plan provided in part:

> The braking systems employed on the Hoyle Winches which are used to suspend the work deck, concrete forms, and the emergency escape conveyance shall be visually examined and tested on each shift by a qualified hoistman prior to allowing men to travel on the platforms or conveyances suspended; or prior to hoisting loads where men may be endangered by the hoisting operation. If such tests reveal that any part of a braking system is not functioning properly, repairs shall be made immediately. The results of such tests shall be recorded in a book maintained for this purpose and shall be signed each shift by the hoistman making such inspections.

28. An electrical foreman periodically inspected the brake mechanisms by pulling off the covers and disconnecting the solenoid to see that they held with power on. Brake linings were also changed about every 2 to 3 weeks. There was no standard requiring the coverings to be removed when the hoist was inspected. On September 21, 1977, a brake was installed on the No. 3 winch.

29. There were two methods of checking the brakes. One involved the hoist operator applying power and moving the winches slightly and then shutting the power off to activate the brakes. If the brakes were out of alignment, a person on the deck would observe a slack cable when the brakes were applied. A slack cable on the No. 2 or No. 3 winch could be observed at the surface because they were mounted on the pad directly in front of the hoist room; however, a slack cable on the No. 1 or No. 4 winch could be observed only from the deck. Under normal circumstances, when the deck was being moved there would be various tensions in each of the four ropes due to differences in the spooling characteristics and the winding of the ropes on the four drums; however, each of the ropes would be taut.

30. The other method of checking the brakes, which was more complicated but more accurate, involved manipulating the solenoid system on each brake. The electrical engineer would isolate the power from the circuit, remove the covers to disconnect the wires serving the solenoid, insulate those wires safely, replace the covers on the solenoid box and on the brake box, and then reapply power to the circuit. The procedure then had to be reversed to put the system back in working order.

The November Inspection

31. On November 21, 1977, Inspector Hulvey, accompanied by another inspector and the mine foreman, inspected the shaft and the three-stage circular work deck at the McClure No. 1 Mine. The deck was in a stationary position. The workmen were on their lunch hour. Inspector Hulvey observed that the No. 1 winch cable was completely slack at the work deck level. He held the cable with his hand and was able to shake it. In the inspector's opinion, the cable was not suspending its designated load. The only brake

holding that side of the deck was the No. 4 brake and the slippage of that brake would allow the drum to turn until the safety pin engaged or until the slack in the rope was taken up. The safety dogs were in the winches.

32. Inspector Hulvey also observed that an air hose was intertwined with the cable. The air hose was hooked to an air pump, which was located at the bottom of the shaft. The hose was lying on the work deck and was intertwined with the two parts of the cable. He believed that whoever placed the hose there should have observed the slack cable.

33. The hose was not interfering with the function of the wire ropes and there was no danger of the hose snapping unless the work deck was moved. If the hose broke, there would be a sudden whipping action of the live end of the hose. If it were only punctured, there would be a sudden air stream which might strike somebody but pose no real danger unless it generated airborn dust or particles.

34. The inspector believed, initially, that the brake was not holding the load. When they reached the outside and put tension on the rope, they found that the brake was working properly but that the rope had not been properly tensioned.

35. On November 21, 1977, Inspector Hulvey issued an order of withdrawal to Respondent, reading in part:

> One of two hoyle winches used to suspend the east side of the three stage work deck in the shaft was not suspending the designated load in that the winch cable of the No. 1 winch was completely slack at the work deck. Pump hoses to a diaphragm pump were intertwined with the cable.

36. He believed that the condition was serious because an unexpected displacement of the work deck would be hazardous to workers on the deck. At the very least, they might lose their balance and fall to the surface of the deck. He observed a tool box and a fire extinguisher on the top level. At times, miscellaneous hand tools, drills and hoses would be lying on the deck surface.

37. The cited condition was abated in about 30 minutes by applying tension to the cable.

38. At 6:30 a.m. on November 21, a preshift examination had been conducted. No defects or infractions were found. At 11:15 a.m., an onshift inspection disclosed that a whip check was missing from the airline shaft bottom and that the pump needed a safety cable.

DISCUSSION WITH FURTHER FINDINGS

At the hearing, counsel for the Respondent orally moved to dismiss the Secretary's petition for assessment of civil penalty in Docket No. NORT 78-387, on the ground that the Secretary failed to introduce in evidence the underlying notice of violation. Respondent argues that the existence of the underlying notice of violation must be established before the validity of the subject section 104(c)(1) order of withdrawal can be established. Respondent argues that without a "chain" established between the notice and order, the Commission lacks jusisdiction to consider the validity of the order.

The Secretary introduced in evidence the order of withdrawal that was issued on October 27, 1977. The order of withdrawal reads in part: "The violation was found during a subsequent inspection made within 90 days after Notice No. 1 J.A.B. was issued on September 7, 1977, and is also caused by an unwarrantable failure to comply with such standard." The Secretary did not introduce in evidence Notice No. 1 J.A.B. However, I conclude that this omission was not fatal to the Secretary's case. I find that the existence of the underlying notice of violation was established when the subject order of withdrawal was received in evidence without objection from Respondent. The existence of the underlying notice of violation is indicated on the face of the order of withdrawal. I find that in the absence of evidence that the underlying notice of violation was contested by Respondent in a review proceeding, the validity of the notice is established for purposes of this proceeding.

Based on the order of withdrawal issued on October 27, 1977, the Secretary has charged Respondent with a violation of 30 C.F.R. § 77.404, which provides: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." The basic issue as to this charge is whether the brake on the No. 3 Hoyle winch malfunctioned and whether the malfunction of the brake rendered the three-stage circular work deck unsafe.

The Secretary argues that a preponderance of the evidence establishes that the brake on the No. 3 Hoyle winch malfunctioned, causing an added strain on the other brakes and rendering the work deck operation unsafe.

The Secretary proposes a penalty of $4,000.

Respondent contends that the malfunction of one brake would not render the work deck unsafe because the remaining brakes could handle the load. Geoffrey Weston, Thyssen's Director of Mining Services, testified that the tilt resulting from the failure of one of the brakes would be so slight that no one on the deck would be in danger of falling to the deck or falling through the bucket well.

Using a scale model of the work deck and the shaft and his mathematical calculations based on the weight and size of the deck, Weston testified that the maximum tilt of the deck would be 2.07 degrees and the maximum vertical deflection would be 8 inches or a 4-percent gradient. Weston testified that if the work deck descended below the concrete formwork while the shaft bottom was being excavated, which was unusual, the degree of tilt would be greater.

Weston testified that a four-winch-operated work deck was designed to operate safely with three ropes and that slackness in one of the ropes after the deck was stopped and the winches were rolled back against the safety pins was common. When the winches were backed off, slackness would be produced in one of the ropes depending on the relative positions of the safety pins when the winches were halted.

At the time of the inspection, the shift had already begun and the crew was on the work deck. The safety pins had been removed and the hoist operator was trying to level the work deck before moving it up or down. It was normal for the deck to become slightly unlevel with a four-winch hoisting system and the operator's action in applying power to the four winches one at a time was an acceptable method of leveling the deck. However, a preponderance of the evidence establishes that the crew was having an unusually difficult time leveling the deck. The inspector testified that the hoist operator told him that they were having trouble keeping the deck level and when the inspector arrived at the deck, the foreman also told him that they were unable to keep the deck level.

I find that, with the safety pins removed, the inability to level the deck created a potential hazard to the crew and imposed a duty upon Respondent to inspect the brakes. A preshift examination and hoisting inspection were conducted before the shift began and no brake defects were found. However, the most common method of testing the brakes, which involved activating the hoist motor and then applying the brakes to see if the brakes held, was done only after the five-man crew had descended to the deck. A proper inspection before the men arrived at the work deck would have revealed a problem with the brakes, requiring a more thorough inspection of the braking system.

I find that the tilt observed by the inspector indicated a defect in the braking system and that this defect presented a safety hazard. A sudden displacement of the deck when the brakes were applied could cause an employee to fall and injure himself either on an object lying on the deck's surface or by wedging a leg or arm between the deck and the shaft wall. I find that the tilt was not caused by the winches winding non-synchronously or by the ropes spooling unevenly on the drums. A tilt while the deck was in motion might result from one of these factors; however, I find that the displacement of the deck when the brakes were applied was caused by a defect in the brakes, as Inspector Hulvey believed. It was a violation to keep men on the deck and to try to operate it without first checking the brakes and correcting any brake defect found.

However, the gravity of the violation was minimal because the antitilt riggers attached to the outside of the work deck would limit the tilting of the deck by wedging against the shaft wall. I find significant the inspector's own experience on the deck when the No. 3 brake's failure to hold properly did not cause anyone on the deck to lose his balance.

The negligence of the operator was also slight because a preshift inspection and hoisting inspection were conducted before the shift began; the crew had been trying to level the deck for only a few minutes before the inspector arrived at the operator's compartment; and the safety features of the three-stage work deck were more than adequate to prevent serious injury if one of the brakes malfunctioned.

Based on the order of withdrawal issued on November 21, 1977, the Secretary has charged Respondent with a violation of 30 C.FR. § 77.404, which provides: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." The basic issue as to this charge is whether the three-stage work deck was in safe operating condition. The Secretary and the Respondent have not filed briefs as to this charge.

I find that the Secretary failed to prove a violation as to this order. As noted above, a slack cable while the deck was stationary was a common occurrence and three cables were capable of supporting the deck in a safe condition. Inspector Hulvey testified that all of the brakes were working properly. The evidence supports a reasonable inference that the slackness in the No. 1 rope was caused by the winch being backed off against the safety pin and that this did not pose a safety hazard. The Secretary did not prove by a preponderance of the evidence that the slack cable constituted an unsafe condition.

Nor did the Secretary show by a preponderance of the evidence that the presence of an air hose intertwined with one of the wire ropes posed a safety hazard under the cited standard. Inspector Hulvey testified that the air hose was not interfering with the function of the wire ropes because the deck was stationary. He said that the only danger was that if the deck was moved, the hose might snap. However, as noted above, the deck often remained stationary for several days and there was no evidence that the deck was about to be moved or that Respondent's crew would not have untangled the hose from the air pump at the bottom of the shaft before moving the deck. The inspector testified that the crew was taking a lunch break at the time of the inspection. I find that the Secretary failed to prove by a preponderance of the evidence that the air hose interfered with the safe operation of the work deck or that the air hose was in danger of snapping or being punctured at the time of the inspection, or that Respondent planned to operate the deck later without disentangling the air hose and wire rope. In addition, the inspector testified that the hazard to the safe operation of the deck posed by the air hose was minimal compared to the hazard of slackness in one of the cables. The gravamen of the Secretary's charge having failed of proof (the slack cable), the air hose condition does not warrant sustaining the November 27 charge of an unsafe condition.

CONCLUSIONS OF LAW

1. The undersigned judge has jurisdiction over the parties and subject matter of the above proceedings.

2. Respondent violated 30 C.F.R. § 77.404 by allowing men to travel on an unsafe work deck as alleged in Order of Withdrawal No. 1 W.W.H. (7-62).

Based upon the statutory criteria for assessing a civil penalty for a violation of a mandatory safety standard, Respondent is assessed a penalty of $100 for this violation.

3. Petitioner did not meet his burden of proving a violation as alleged in Order of Withdrawal No. 1 W.W.H. (7-67).

ORDER

WHEREFORE IT IS ORDERED that (1) the charge based on Order of Withdrawal No. 1 W.W.H. (7-62) is DISMISSED, and (2) Clinchfield Coal Company shall pay the Secretary of Labor the above-assessed civil penalty, in the amount of $100, with 30 days from the date of this decision.

William Fauver
WILLIAM FAUVER, JUDGE

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 30 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner
v.

ROYAL DARBY COAL COMPANY, INC.,
Respondent

Civil Penalty Proceeding

Docket No. KENT 80-220
Assessment Control
No. 15-07077-03017 V

No. 1 Mine

DEFAULT DECISION

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner;
No one appeared at the hearing on behalf of Respondent.

Before: Administrative Law Judge Steffey

When the hearing in the above-entitled proceeding was convened in Barbourville, Kentucky, on November 19, 1980, pursuant to written notice of hearing dated September 24, 1980, and received by respondent on September 26, 1980, counsel for the Secretary of Labor entered his appearance, but no one appeared at the hearing to represent respondent.

Section 2700.63(a) of the Commission's Rules of Procedure provides that when a party fails to comply with an order of a judge, an order to show cause shall be directed to the party before the entry of any order of default. An order to show cause was sent to respondent on November 21, 1980, pursuant to 29 C.F.R. § 2700.63(a). A reply to the show-cause order was timely filed by the operator on December 1, 1980. The operator states that he was unable to attend because his father passed away on the evening of November 18, 1980, and was buried November 21, 1980. In such circumstances, the operator asks that he not be held in default and that another hearing be scheduled.

It seems harsh to find an operator in default in circumstances which show that the operator's father died on the evening of the day preceding the day on which the hearing was scheduled to be held. I would be willing to find that respondent had satisified the show-cause order and I would be willing to reschedule the hearing if the operator had stated that he made any effort whatsoever to notify me before the hearing of the fact that his father's death would prevent him from being able to be present at the hearing. The operator knew that the hearing was scheduled to be held in the conference room at the Office of the Mine Safety and Health Administration in Barbourville, Kentucky. That office opens for business at 7:00 a.m. each day and MSHA's employees do not leave until 5:30 p.m. Even after 5:30 p.m., a member of the custodial force will answer the phone if a call is made to the office.

Respondent's failure to call the MSHA office on November 18, 1980, or on the morning of November 19, 1980, caused us to have to pay a reporter for being present at a hearing which lasted about 2 or 3 minutes. Additionally, the Secretary's counsel drove all the way from Nashville, Tennessee, to Barbourville, Kentucky, for the sole purpose of representing MSHA at the hearing because all other cases scheduled on or after November 19, 1980, were either settled or continued long in advance of the time set for the convening of the hearing in this proceeding.

The operator's answer to the show-cause order does not state specifically what time his father died. Even assuming that his father died at 11:59 p.m., which is as late as the death could have happened and still be said to have occurred on November 18, 1980, a call to the MSHA office at 7:00 a.m. on November 19, 1980, would have enabled the reporter, MSHA's attorney, the inspector, and me to start our return trips to our various offices instead of waiting around, as we did, for well over an hour after 9:00 a.m. to provide the operator with the hearing he had requested in the event he should make a tardy appearance.

I previously held a hearing in Barbourville on August 8, 1978, with respect to the operator's cases in Docket Nos. BARB 78-387-P and BARB 78-419-P. At that hearing, the operator presented his section foreman as a witness and introduced documentary evidence. The citation involved in this proceeding was served by the inspector on respondent's section foreman. Therefore, the operator was forced to rely upon the first-hand knowledge of his section foreman to present a defense to the alleged violation. In this proceeding, the hearing was scheduled to be held on the morning of November 19, 1980. Consequently, respondent would have had to have prepared for the hearing on November 18, 1980, prior to the death of his father who is said to have died on the evening of November 18. Preparation for the hearing would at least have involved his alerting his section foreman to be ready to travel to Barbourville early in the morning because the operator had to drive to Barbourville, Kentucky, from Louellen, Kentucky, a distance of about 45 miles. If the emotional stress associated with the death of the operator's father caused him temporarily to forget about the hearing, his section foreman would have reminded him very early the next morning that he had failed to meet the section foreman for the trip to Barbourville.

Additionally, as I noted in my decision issued February 7, 1979, in Docket Nos. BARB 78-387-P and BARB 78-419-P, the operator has a history of ignoring his obligations with respect to our hearings. On pages 1 and 2 of my decision in Docket Nos. BARB 78-387-P, et al., I noted that respondent had requested an opportunity to file a posthearing brief. He was given a period of 30 days after receipt of the transcript within which to file the brief. The operator never did file that posthearing brief and never did notify me that he no longer wished to file a brief even though I waited for 5 months after the transcript was received before writing my decision in order to give him plenty of time within which to file the brief. My decision also noted on page 1 that the operator had made similar requests in other hearings and had never filed a brief in any instance after he had requested an opportunity to do so.

The foregoing facts show that the operator has consistently ignored his reponsibilities as a participant in our proceeding and has shown indifference to the expenses to the Government and time wasted by Government personnel in providing him with procedural due process. I find that the operator has shown no reason in his answer to the show-cause order why he could not have notified me or the MSHA office of his father's death so that at least some of the time, effort, and expense associated with providing him with an opportunity for a hearing on November 19, 1980, could have been avoided.

For the foregoing reasons, I find respondent to be in default. Section 2700.63(b) of the Commission's Rules of Procedure provides that when a judge finds a respondent to be in default in a civil penalty proceeding, he shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid.

WHEREFORE, it is ordered:

Within 30 days from the date of this decision, Royal Darby Coal Company, Inc., shall pay a civil penalty of $500.00 which was proposed by the Assessment Office with respect to the violation of section 75.200 alleged in Citation No. 746688 dated September 24, 1979.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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